Chapter 1

OVERVIEW

I. Mission

The citizens of Los Angeles County have the right to expect that their elected and appointed officials will carry out their duties in a lawful, ethical and professional manner. They also have the right to expect that administrators, supervisors and the immediate subordinates of elected and appointed officials, who play an integral role in achieving the mission of the office holder, will discharge their duties and obligations in the same lawful, ethical and professional manner.

The District Attorney has created the Public Integrity Division, whose mission it is to ensure that public and appointed officials, and their subordinates, fulfill their legally mandated duties. To this end, the District Attorney's Office will use all resources at its disposal to detect, investigate and prosecute criminal misconduct at all levels of public service.

Through its efforts, the Public Integrity Division's ultimate goal will be to increase the public's level of confidence in its elected and appointed officials.

The Public Integrity Division will aggressively and proactively seek out public corruption at all levels of government. All matters referred to the Public Integrity Division for consideration will be thoroughly and fairly reviewed. Criminal charges will be filed in all appropriate cases. Aiding/abetting and conspiracy theories of liability will be considered in every case, and multiple defendants will be filed on whenever legally and factually warranted.

Often, documents are the most persuasive evidence with which to establish fraud and corruption. Public Integrity Division investigators will prepare and serve search warrants whenever appropriate, as they are a critical tool in uncovering evidence of corruption and are invaluable in establishing our public position that corruption will not be tolerated. In some situations, a grand jury subpoena may be a more effective tool for obtaining documentary evidence.

In sensitive cases which may require a higher level of confidentiality, Public Integrity Division deputies will consider proceeding by way of grand jury indictment rather than criminal complaint. The subpoena power of the grand jury, as well as the contempt power of the supervising judge, will be used in cases in which witnesses are reluctant to provide information to investigators.

II. Scope Of Responsibility

The Public Integrity Division is responsible for vertically prosecuting the following types of crimes:

A. Public Officials

Public officials are elected or appointed to positions of public trust. The community depends on their honest application to duties and their obligation to serve the best interests of the community. In the event of any breach of this trust, the Public Integrity Division will investigate and, if appropriate, prosecute criminal misconduct by any elected or appointed public official. It is the responsibility of the Public Integrity Division to investigate and prosecute criminal conduct by a public official when that conduct relates to the official's duties as a public servant. The term "public official" is to be defined in the broadest possible manner and includes state, county and city officials.

Because many public officials maintain powerful connections, even after they are no longer in elected or appointed positions, the Public Integrity Division is also responsible for investigating and prosecuting retired or former public officials for conduct related to their official duties while in office.

Subordinates and employees of public officials, whose duties directly impact or affect the public's business, are also subject to investigation and prosecution by the Public Integrity Division for crimes committed which directly impact or effect the public's business. This includes, among others, court clerks (except those directly assigned to courtrooms), DMV employees and all city and county employees. Misconduct by subordinates, which is not committed during the course and scope of their official duties, will continue to be handled by the appropriate branch or area office in whose jurisdiction the crime occurred.

B. Public Institutions

Public institutions, such as city and county boards and commissions, perform an important role in a democratic society. These public institutions include: the Metropolitan Transit Authority, redevelopment agencies, airport commissions, water districts, etc. It is imperative that these board members and commissioners pursue their duties in a lawful manner. As such, allegations of misconduct by members of these institutions, related to their official duties, shall be investigated and prosecuted by the Public Integrity Division.

C. School Officials

The Public Integrity Division is also responsible for the investigation and prosecution of school officials, such as members of local school boards, superintendents, principals, teachers and office administrators, who engage in criminal misconduct relating to the discharge of their duties. This includes theft, fraud and other inappropriate or illegal use of public funds. Allegations of physical or sexual misconduct by school officials will be investigated by the appropriate agency.

D. Election and Campaign Violations

Because the integrity of the election process is crucial to a free and democratic society, the District Attorney's Office must be vigilant in enforcing all laws that regulate the election process. In this regard, the Public Integrity Division is charged with investigating and prosecuting allegations of voter fraud, illegal voter registration practices, illegal campaign practices, illegal electioneering and falsification of candidacy papers. (See chapter 7 listing the penal provisions of the Elections Code).

The Political Reform Act, hereinafter, P.R.A. (California Government Code §81000 et seq.) requires that elected officials and candidates for elected office fully disclose all contributions and expenditures, that elected officials disclose all assets and sources of income, and that public officers be disqualified from taking official action on a matter in which they have a financial interest. The Fair Political Practices Commission has the responsibility of enforcing the P.R.A. and can take administrative action against those in violation. Violations of the P.R.A. are also misdemeanors. Government Code §91001 empowers the Attorney General and local district attorneys with prosecuting violations criminally. The Public Integrity Division is responsible for reviewing all potential violations of the P.R.A. and determining whether a criminal prosecution is appropriate. In cases in which a criminal prosecution is declined, the matter may be referred to the F.P.P.C. for review.

E. Conflicts Of Interest

A public servant cannot serve two masters. The duties of public office demand the absolute loyalty and undivided, uncompromised allegiance of the individual that holds the office. An impairment of impartial judgment can occur in even the most well-meaning person, when their personal economic interest is affected by the business they transact on behalf of the government.

Government Code sections 1090 et seq., prohibit public officials from entering into, or voting for, contracts in which they have a financial interest. A violation of C.G.C. §1090 is a felony and permanently

disqualifies the defendant from holding any public office. (See chapter 3 for a detailed explanation of C.G.C. §1090).

Government Code §87100 prohibits public officials from making or influencing a governmental decision in which he or she has a financial interest. Unlike Government Code §1090, no contract is required. A violation of §87100 is a misdemeanor and disqualifies the official from running for any elected office for four years.

All conflict of interest allegations will be reviewed by the Public Integrity Division. Since the Fair Political Practices Commission also has jurisdiction to investigate alleged Government Code §87100 violations, in appropriate cases a matter may be referred to that agency for possible administrative action.

F. Brown Act Violations

The Brown Act (California Government Code §54950 et seq.) governs meetings conducted by local legislative bodies such as boards of supervisors, city councils, water boards and school boards. As these legislative bodies are charged with conducting the public's business, the Brown Act ensures that that business be conducted in open meetings, allowing public access and a free exchange of opinions. The law recognizes that a balance must be struck between the public's right to open meetings and the legislative body's need for confidentiality in certain circumstances. Although the Brown Act allows for closed sessions in specific, narrowly drawn exceptions, there is a presumption in favor of public access. (See chapter 5 for the complete text of the Brown Act).

The District Attorney's Office has the authority to prosecute individual members of the legislative body criminally, and to initiate civil actions to prevent or nullify actions taken in violation of the Brown Act, or to seek declaratory relief. The Public Integrity Division has the responsibility of investigating and prosecuting allegations of Brown Act violations.

In the event of a violation, the priority of the Public Integrity Division will be to persuade the body to nullify the action improperly taken and to agree to a new, noticed and open hearing. In cases where the body refuses to cooperate, a civil lawsuit will be instigated. In cases where action is taken by the body, and the members intend to deprive the public of information to which the members know the public is entitled, criminal charges will be filed.

G. Accusations

Pursuant to California Government Code §3060, a public official may be removed from office for "willful or corrupt misconduct in office." "Willful

or corrupt misconduct" has generally been defined to mean serious misconduct that involves criminal behavior or, at the least, a purposeful failure to carry out mandatory duties of office.

An accusation is brought by the grand jury and requires at least 12 grand jurors to concur. If at least 12 grand jurors concur, the matter is referred to the district attorney. The issue is litigated by a district attorney in front of a jury with the same evidentiary rules as a criminal trial. Following a verdict by the jury, the trial judge orders the official removed from office.

Any accusations brought by the grand jury shall be litigated by the Public Integrity Division. (See chapter 15: Government Code §3060, for additional information and cases).

H. Quo Warranto

Quo warranto is a civil mechanism to remove from office a public official who is unlawfully in office. It is most commonly used in cases in which a public official is either holding incompatible offices or does not reside within the political district in which he serves.

Quo warranto proceedings can only be initiated by the California Attorney General's Office, or by one acting with the approval and under the supervision of the Attorney General's Office. *Quo warranto* differs from accusations in that no showing of malfeasance or crime is required, and the burden is on the public official to prove they lawfully hold office. In situations in which a public official is not legally qualified to occupy his position, *quo warranto* would be the appropriate vehicle by which to remove him from office. (See chapter 16 for additional information, and relevant code sections, relating to *quo warranto* proceedings).

I. Internal Welfare Fraud

It is well documented that the welfare system is fraught with fraud and the monetary loss to the County is staggering. Cases involving welfare recipients bilking the government out of thousands, or even hundreds of thousands of dollars are widely publicized. A less public, but even more disturbing problem, involves the fraudulent theft of government funds by those charged with distributing those funds to worthy recipients.

Through an agreement with the Department of Public Social Services, the Public Integrity Division, through the Internal Welfare Fraud Unit (IWFU), is responsible for investigating and prosecuting cases involving fraud by employees of D.P.S.S. Additionally, the IWFU investigates and prosecutes individuals and agencies who falsely obtain funds through contracts with the County through D.P.S.S. The Internal Welfare Unit is currently staffed with one full-time prosecutor and nine full-time

investigators assigned exclusively to handle these cases. (See chapter 12 for a complete discussion of the Internal Welfare Fraud Unit's policies and procedures).

III. Investigative Agencies

The Public Integrity Division includes a cadre of investigators assigned exclusively to initiate and coordinate investigations involving subject matter coming under the jurisdiction of the division. In addition to having the authority to launch investigations independently, the D.A. investigators may also be called upon to assist other outside agencies, as well as provide trial assistance to PID deputies.

The Los Angeles County Auditor-Controller's includes a Special Investigations Unit which is responsible for investigating fraud and corruption among County employees. The Public Integrity Division works closely with this investigative arm of the Auditor-Controller, offering advice and investigative assistance in addition to reviewing cases for prosecution. The Los Angeles City Controller's Office also has a division that investigates allegations of city employee misconduct.

The Public Integrity Division enjoys a close working relationship with the Los Angeles City Ethics Commission's Enforcement Division. The attorneys and investigators at C.E.C. have specialized expertise in city campaign finance laws and have been instrumental in several high-profile campaign money laundering prosecutions.

The Inspector General's Office of the L.A.U.S.D. investigates cases involving fraud and corruption by L.A.U.S.D. employees and presents those cases involving criminal conduct to the Public Integrity Division for prosecution.

Cases involving election irregularities may be referred to PID for investigation by the County Registrar-Recorder. The California Secretary of State is also responsible for investigating allegations of election irregularities and may refer cases to PID for prosecution.

Additionally, the Public Integrity Division works with several other investigative agencies, including D.P.S.S., the Department of Motor Vehicles, the M.T.A. Inspector General and the Fair Political Practices Commission.

IV. Policies And Procedures

A. Case Routing

There are two ways an "action" is initiated in PID. Either a case is presented by an investigative agency for filing review, or a written complaint is received seeking some action, usually a request for

investigation, by PID. In either situation, an Opening Case Data Sheet shall be prepared by the Head Deputy or Assistant Head Deputy and a PID number issued. The Head Secretary shall maintain a data base of all cases in which a PID number is issued. Once a PID number is assigned, the Head Deputy or Assistant Head Deputy will make an initial determination as to what action, if any, should be taken.

B. Case Presentation

When a case is presented by an outside investigative agency for filing, the Head Deputy or Assistant Head Deputy will make a cursory review to determine, first, whether the case falls within the parameters of the Public Integrity Division, and second, whether there appears to be sufficient evidence to justify a further, in-depth, review.

If these two criteria are met, the case will be assigned to a D.D.A. for a detailed filing review. It will be the assigned D.D.A.'s responsibility to contact the investigator, coordinate any additional investigation and prepare either a Case Filing Memorandum or a Declination. On cases assigned to a PID deputy for filing review, every effort shall be made to file or reject the case within 90 days of receipt. In the event the case is filed, the filing D.D.A. will vertically prosecute the case to conclusion.

C. Complaints And Requests For Investigation

All complaints and requests for investigation shall be submitted in writing and will be reviewed by the Head Deputy or Assistant Head Deputy. If the issue appears to be one that falls within the jurisdiction of the Public Integrity Division, a determination will be made as to what further action, if any, is warranted. Those that are determined to warrant no further action will be closed, and a response letter to the complainant will be prepared and mailed. The letter shall state the reasons why the request for investigation was declined.

If the complainant was anonymous, or there is no contact information for the complainant, the reasons why no action was taken shall be noted on the Opening Case Data Sheet.

The complaint or request for investigation will be assigned to either a D.D.A. or an investigator based upon the following:

1. Preliminary Inquiry

If the facts, as alleged in the request for investigation, would, if true, clearly constitute a crime, the request will be assigned to a D.A.I. for a preliminary inquiry. During the pendency of the inquiry, the case will be assigned to the Head Deputy.

a) If the preliminary inquiry establishes probable cause to believe a crime occurred, the matter will be designated as a criminal investigation and a PID D.D.A. will be assigned to work with the investigator. The PID deputy assigned will ultimately make a determination as to whether criminal charges should be filed and, in the event of a filing, vertically prosecute the case.

   1) If, after a thorough investigation, it is determined that the matter be closed without a criminal filing, the assigned D.D.A. will prepare a memo to the file, or a letter to the complainant, stating the reasons why a criminal prosecution is not appropriate.

b) If the preliminary inquiry results in a determination by the D.A.I. that further investigation is unlikely to lead to a fileable case, the D.A.I. will make a recommendation to the Head Deputy or Assistant Head Deputy that the case be closed. If the Head Deputy or Assistant Head Deputy agrees, the case will be closed, and a memo to the file or a letter to the complainant prepared stating the reasons why a full investigation is not warranted.

2. Case Disposition

If further research or legal analysis is required to determine whether the facts as alleged would, if true, constitute a crime, the case will initially be assigned to a D.D.A. for a legal determination.

a) If, after a thorough analysis of the legal issues, the assigned D.D.A. determines the facts as alleged would not constitute a crime, the D.D.A. will make a recommendation to the Head Deputy to close the case. If the Head Deputy concurs, the case will be closed and a memo to the file or a letter to the complainant shall be prepared by the assigned D.D.A.

b) If, after a thorough analysis of the legal issues, the D.D.A. determines the facts as alleged would constitute a crime, an investigator will be assigned. The assigned D.D.A. will continue to handle the case for possible filing and, in the event of a filing, vertically prosecute the case. In the event that the assigned D.D.A. and D.A.I. determine that the matter will not lead to the filing of criminal charges, the case will be closed and a memo to the file or a letter to the complainant shall be prepared by the D.D.A.

D. Case Filing Memorandum

No case shall be filed by a PID deputy without prior Head Deputy and Bureau Director's approval. Prior to filing any PID case, the assigned deputy shall prepare a Case Filing Memorandum to the Director of Fraud and Corruption Prosecutions through the Head Deputy of PID. The Case Filing Memorandum shall include the following information:

a) Name, address and DOB of all defendants
b) Name and agency of the investigating officer
c) Recommended bail amount
d) Code section and description of each charge
e) Proposed filing date
f) The maximum possible sentence
g) Summary of the facts:
    1) If the summary of facts is lengthy, precede the summary with a brief synopsis
h) If the case involves unusual facts or a novel theory of liability, include any appropriate legal analysis justifying the filing of criminal charges
i) A statement as to when/if the Public Information Officer can release information

The case shall be filed only after the Bureau Director has approved filing, and the proposed filing date contained in the memo has passed.

When a case is presented to PID for filing, and the suspect is in custody, the case shall not be filed without verbal approval from the Bureau Director. A Case Filing Memorandum is still required but may be prepared after filing is complete. The memo shall be prepared as soon as possible.

If the case appears to be a major or significant case as defined by the Legal Policies Manual, a separate memo is required.

E. Declinations To File

When a case is presented for filing consideration by an outside agency, and filing is declined, that declination to file shall be in writing. A "blue" Charge Evaluation Worksheet shall be prepared, with a separate sheet attached which shall include the following:

a) A factual analysis
b) A legal analysis
c) A conclusion, stating the reason(s) for the declination

Cases investigated by PID investigators will not result in a "blue" Charge Evaluation Worksheet. All investigations handled by PID investigators that do not result in a prosecution shall be closed by a memo to file or a letter to the complainant as discussed above in section IV.C.1.a.1).

F. Cases Previously Filed By Other Divisions

Occasionally, cases that have been filed by units other than PID will be referred to PID for possible prosecution. These referrals will be reviewed by the Head Deputy or Assistant Head Deputy, who will consider the following:

a) Whether the case meets the criteria of PID.
b) Whether the status of the case allows PID an adequate opportunity to prepare for the next scheduled hearing.
c) Whether accepting the case would adversely effect the current caseload of PID.
d) Whether the case was filed according to PID standards and policies.

If, after evaluating the case, the Head Deputy, or Assistant Head Deputy, determines the case to be appropriate for prosecution by PID, an Opening Case Data Sheet will be prepared and a PID case number assigned.

G. Grand Jury

In appropriate cases, PID deputies may seek an indictment by grand jury instead of proceeding by way of felony complaint. Also, in some cases it may be appropriate to use the investigative function of the grand jury in order to obtain witness statements or documentary evidence. Pursuant to Section 1 of the Manual on Grand Jury Practice & Procedure, cases involving official misconduct or corruption are among those suitable for presentation to the grand jury.

The procedure for obtaining approval to take a case before the grand jury is contained in Section 5 of the grand jury manual. PID deputies shall follow that procedure in all cases in which use of the grand jury process is sought. Please note that a written memorandum and authorization from the Assistant District Attorney is required to take a case before the grand jury.

A grand jury subpoena is an excellent tool for obtaining documentary evidence and should be seriously considered as an option in all cases. In cases where there is a legitimate concern that the party from whom the documents are requested may refuse to honor the subpoena, or destroy the sought after documents, a search warrant shall be used instead.

H. Arrest v. Surrender

Once criminal charges have been filed against a public official or public employee, a determination has to be made as to whether the defendant should be arrested or given the opportunity to surrender in court. In cases in which the Bureau of Investigation is the primary investigative agency, that determination will be made by the Chief of the Bureau. In cases investigated by outside agencies, the filing deputy shall make the recommendation, after consulting with the investigative agency, regarding the appropriate process based on the following criteria:

a) Whether or not the defendant is a flight risk.
b) Whether there is any evidentiary value to be gained by an arrest, such as obtaining a statement or other evidence.
c) Whether the crime charged involved the use of violence.
d) Whether there was a pre-filing request by counsel to allow the defendant to surrender.

The recommendation, supported by a discussion of the above criteria, should be included in the Case Filing Memorandum.

I. Case Settlement Policy

PID deputies shall follow the Felony Case Settlement Policy as described in Chapter 12 of The Los Angeles County District Attorney's Office Legal Policies Manual. Section 12.04.02 of the Legal Policies Manual requires Head Deputy approval when any defendant is pleading to a felony charge with a "no immediate state prison" sentence commitment.

Public officials and employees who violate the public trust by committing crimes in office should be required to take full responsibility for their actions. Additionally, the public record, including court files and criminal justice data bases, should accurately reflect the particular conduct for which the official or employee was convicted. In order to accomplish this purpose, public officials and employees shall be required to plead to the charge which most accurately describes their criminal conduct.

All PID case settlements shall require the defendant to plead guilty, as opposed to *nolo contendere*. Any "no contest" pleas must be approved by the Head Deputy.

J. Monthly Case Status Reports

All PID attorneys will submit a Case Status Report to the Head Deputy no later than the 20th of each month. The purpose of the case status report is to provide information to the Head Deputy as to current caseloads, pending court appearances and the status of ongoing investigations.

The Case Status Report shall contain one case per page and include the following information:

1) Case number
2) Case type
3) Name of the public official targeted/charged
4) Title of the public official
5) The agency employing the public official
6) The name of the complainant
7) The complainant's agency (if any)
8) The name of the investigator (if any)
9) The investigative agency (if any)
10) The date the P.I.D. case was opened
11) The case status
12) The date of the alleged incident
13) The date the statute of limitations will run
14) A one paragraph statement of the facts
15) Action since last report
16) Plan for next 30 days
17) Date and location of next court date (if any)

Once monthly, the PID deputy and the Head Deputy will meet to review and discuss all pending cases.

K. Brown Act Violations

All alleged Brown Act violations will be handled in accordance with the October 11, 2002, protocol contained in the Brown Act section of this manual.

L. Correspondence

All correspondence generated by PID deputies shall be approved by the Head Deputy or Assistant Head Deputy prior to being mailed.

M. Search Warrants

Search warrants are excellent investigative tools. They are especially useful in the seizure of documents which may evidence fraud and corruption. In each PID case, a decision should be made as to whether a search warrant would be appropriate and when and how to utilize them.

Although the affidavit and warrant will not normally be prepared by the PID deputy, the legal sufficiency of the warrant is the sole responsibility of the PID deputy assigned to the case. Prior to final review by the Head Deputy, every warrant shall be reviewed thoroughly by the assigned

deputy. The deputy shall review not only the legal sufficiency of the affidavit and warrant, but also make certain that all potential evidence relevant to the investigation is listed in the warrant. The PID deputy shall work closely with the investigator to make any needed corrections or additions.

Prior to service, all PID search warrants shall be reviewed by the Head Deputy or Assistant Head Deputy. In high profile cases, the Bureau Director shall be notified and provided an opportunity to review the warrant.

PID deputies shall be familiar with, and follow, the procedures contained in Chapter 20 of the Legal Policies Manual regarding special procedures in the use of search warrants. Special attention should be paid to Section 20.04 which establishes the policy for searching the holder of a legal privilege.

N. Media Or Public Inquiries

The identity of the complainant shall not be disclosed. Complainants are to be treated as confidential informants and their identities disclosed only if they are percipient witnesses to any of the events complained of.

PID deputies shall refer all media inquiries to media relations.

In compliance with section 25.04 of the Legal Policies Manual, any press inquiries and responses should be reported to Media Relations.

Chapter 2

MISUSE OF PUBLIC FUNDS

I. Introduction

In any situation in which a public official or public employee is suspected of stealing or misusing public funds, Penal Code §424 is the preferable statute to charge, instead of embezzlement (Pen. Code §504) or grand theft (Pen. Code §487).

Unlike grand theft, there is no monetary loss threshold requirement. Unlike theft and embezzlement, there is no fraudulent intent requirement (with the exception of subsection (a)(4); although the recent case of *People v. Stark* (2011) 52 Cal. 4th 368 does create a knowledge requirement). Additionally, for an elected official, a conviction of Penal Code §424 results in both removal from public office and possibly, if the misappropriation was done by embezzlement pursuant to P.C. 1203 (c)(7), a presumptive state prison commitment.

Penal Code §424 does not only prohibit the taking of public funds. There are seven subsections contained in the statute, listing a wide variety of actions that can result in a Penal Code §424 violation. The list of actions giving rise to a Penal Code §424 prosecution includes: misappropriating public funds, using the funds for a purpose not authorized by law, loaning public funds, and making a profit off of public funds. Additionally, keeping a false account, making a false entry or erasure in any account, or altering, falsifying, concealing, destroying or obliterating any account can also result in a violation. Review each subsection prior to making a filing decision as some subsections have a knowledge requirement, and one requires a fraudulent intent.

II. Elements

A. To whom it applies

Penal Code §424 applies to "each officer of this state, or of any county, city, town, or district of this state and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys..." The statute does not apply to every employee who misuses public funds, but only those who are considered to be "officers," or who are charged with the receipt, safekeeping, transfer, or disbursement of those funds.

1. Public Officers

It would seem clear based on the case authority, that any elected official would be a public officer, and that most appointed, high-ranking supervisors in the public sector would also fall within that category. However, case law also makes it clear that lower-level public employees have to fall within the category of one "charged with the receipt, safekeeping, or disbursement of public moneys" in order to be liable for prosecution under Penal Code §424.

a) Case law has defined a "public officer" as something more than a mere government employee. (*People v. Rosales* (2005) 129 CA4th 81, holding that a Superintendent of a County Parks and Recreation Department, who was supervised by an Assistant Director, was not a public officer.)

b) "The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and entrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the political unit for which he, as agent, is acting." (*Dibb v. County of San Diego* (1994) 8 Cal.4th 1200, 1212.)

c) *Spreckels v. Graham* (1924) 194 C 516, although not a Penal Code §424 case, offers a definition of the term "public officer:" "Two elements now seem to be almost universally regarded as essential" to a determination of whether one is a "public officer:" "First, a tenure of office 'which is not transient, occasional or incidental,' but is of such a nature that the office itself is an entity in which incumbents succeed one another ... , and, second, the delegation to the officer of some portion of the sovereign functions of government, either legislative, executive, or judicial." (*Spreckels v. Graham*, supra, 194 Cal. at p. 530.)

d) Where the legislature creates a position, prescribes the duties and fixes the compensation and such duties pertain to the public and are continuing and permanent, such position or employment is public office and he who occupies it is an officer. (*Bennett v. Superior Court* (1955) 131 CA2d 841.)

e) "Since it is the duty of the board to manage and conduct the business and affairs of the district (California Water Code, § 21385) the secretary to whom certain of its duties are delegated would be not a mere employee but an officer of the district." (*People v. Schoeller* (1950) 96 CA2d 61, 63.)

f) However, the unpublished case of *People v. Jeffrey Hubbard* (2013) held:

(1) "public officers" must also be persons charged with the receipt, safekeeping and disbursement of public money in order to violate section 424; and

(2) a School District Superintendent is neither a public officer, nor a person charged with the receipt, safekeeping and disbursement of public money.

Hubbard is contrary to all previous case law, and is now under review by the California Supreme Court.

2. Other persons charged with the safekeeping of public funds

In addition to public officers, those charged with handling public funds as part of their employment can also be prosecuted for a violation of Penal Code §424.

a) "Because of the essential public interest served by the statute, it has been construed very broadly. The state Courts of Appeal have held that to be charged with the receipt, safekeeping, transfer, or disbursement of public moneys within the meaning of §424 requires only that the defendant have some degree of control over public funds, and that control need not be the primary function of the defendant in his or her job. A defendant need not ever have actual possession of public moneys. The statute also applies to persons whose primary duties are unrelated to public moneys, and is not limited to public officers, but includes 'every other person' with some control over public funds." (*People v. Groat* (1993, 6th Dist) 19 CA4th 1228, 1232)

b) In *People v. Evans* (1980) 112 CA3d 607, where the defendant had the authority to complete emergent aid requisitions which resulted in the issuance of checks to public assistance recipients, the court determined the defendant was a "person charged with the receipt, safekeeping, transfer, or disbursement of public moneys."

c) The following have been determined to fall within the class of persons subject to Penal Code §424:

- Appointed secretary of an irrigation district (*People v. Schoeller* (1950) 96 CA2d 61)
- Judicial clerk (*Bennett v. Sup. Crt.* (1955) 131 CA3d 841)
- County medical director who approves invoices (*People v. Lee* (1975) 48 CA3d 516),

- County supervisor (*Webb v. Sup. Crt.* (1988) 202 CA3d 872),
- Parking meter collector (*People v. Wall* (1980) 114 CA3d 15)
- Police officer failing to turn over bail money to the city (*People v. Best* (1959) 172 CA2d 692)

B. Appropriation v. use of public funds (424(a)(1) v. 424(a)(2))

"To understand section 424(a)(1), it is necessary to contrast that provision with section 424(a)(2). The latter provision makes it a crime to use public money for any purpose not authorized by law. The former provision, on the other hand, makes it a crime to appropriate public money to one's own use or the use of another without authority of law. To 'appropriate' means 'to take exclusive possession of,' 'to set apart for or assign to a particular purpose or use' or, 'to take or make use of without authority or right.' (Webster's Collegiate Dict. (10th ed. 2000) p. 57, col. 2.)

Applying these definitions, a public official can violate section 424(a)(1) without actually using public money; it is enough if the official simply takes the money or sets it aside without authority. Under this construction of the statutes, section 424(a)(1) and section 424(a)(2) criminalize different acts, and neither is superfluous. (See *People v. Ramirez* (2003) 109 Cal. App. 4th 992, 1001 [135 Cal. Rptr. 2d 542] [courts must ' 'give effect and meaning to all parts of a law if possible and avoid interpretations which render statutory language superfluous' '].)

The unauthorized *use* of public money is a violation of section 424(a)(2). The unauthorized *appropriation* of public money is a violation of section 424(a)(1), regardless of whether the money is ever actually used. (*Stark v. Superior Court* (2011) 52 Cal.4th 368)

C. No requirement that defendant personally disperse the funds

There is no express language in Penal Code §424 that restricts its application to cases where the officer's duties include the possession of public funds, rather, the statute was also intended to cover situations where the officer was merely charged with the duty of controlling public funds.

a) Thus, in a prosecution of a county assessor for a Penal Code §424 violation, for unlawful use of "account" money, the assessor had control over the public monies within the meaning of Penal Code §424, where he testified that as the department head for audits he was authorized to expend the funds within the account as he saw fit. (*People v. Vallerga* (1977) 67 CA3d 847)

b) The definition of those charged with the receipt, safekeeping, transfer, or disbursement of public funds has been held not to be

limited to those who physically disperse public funds but also to include those who control public funds "so as to cause their expenditure for nonpublic purposes." (*Webb v. Superior Court* (1988) 202 CA3d 872.)

c) In the case of *People v. Sperl*, 54 CA3d 640, a county marshal was convicted of violating Penal Code §424(a)(1) by assigning a deputy marshal to use a county vehicle to chauffer an assemblyman and his family around town. One of *Sperl's* defenses was that he did not pay the deputy's salary, it was paid by the county controller, and therefore he did not actually disperse any public funds. The appellate court was not swayed.

d) In *People v. Groat*, 19 Cal.App.4th 1228, the court held that a manager of a city department of public safety who reported on her time card the number of hours for which she was to be compensated each pay period, and did not have to record her actual time in and out, had control over the public funds eventually paid to her as salary, and was therefore a person charged with their disbursement for purposes of Penal Code §424.

"To be charged with the receipt, safekeeping, transfer, or disbursement of public moneys within the meaning of section 424 requires only that the defendant have some degree of control over public funds and that control need not be the primary function of defendant in his or her job." (*People v. Groat* (1993) 19 Cal.App.4th 1228)

However, an employee who merely signed blank timesheets, and whose supervisor filled out and approved the timesheets, was not a person charged with the receipt, safekeeping and disbursement of public moneys. (*People v. Aldana* (2012), 206 Cal.App.4th 1247)

D. Aiding/abetting

As with other crimes, an aiding and abetting theory can be used to extend liability to one who does not fit within the class of persons described in Penal Code §424. For example, in the case of *People v. Qui Mei Lee* (1975) 48 CA3d 516, a secretary who assisted her supervisor, a county medical director, in preparing fake invoices was liable under Penal Code §424 even though she was not an "officer" or one charged with the disbursement of public funds.

E. Public moneys

Penal Code §426 defines public moneys as follows: "The phrase "public moneys," as used in Sections 424 and 425, includes all bonds and evidence

of indebtedness, and all moneys belonging to the state, or any city, county, town, district, or public agency therein, and all moneys, bonds, and evidences of indebtedness received or held by state, county, district, city, town, or public agency officers in their official capacity."

a) In the *Sperl* case discussed above, the defendant claimed that he did not misappropriate "public moneys" within the meaning of §424 because the use of the county car and the services of the county employees during county time did not constitute money, even though evidence was presented that the loss to the county was $1,956.23. The court held: "Under such circumstances the trial court properly found that the transportation of Hayes, his family and staff resulted in a substantial monetary loss to the county by reason of the payment of the deputies' salaries while performing these improper tasks and that this constituted a misappropriation of public moneys within section 424, subdivision 1."

b) In *People v. Holtzendorff*, 177 CA2d 788, several employees of the Housing Authority were sent home by defendant to work on a campaign and were paid with Housing Authority funds. The court stated at page 806: "The defendant argues that if anything was taken from the Authority it was services, not money. But the services of these typing employees was not a commodity paid for and received and then diverted from its authorized purpose. It was the Authority's money that was appropriated and it went for services already rendered, but not to the Authority, nor for any use or purpose in the lawful execution of defendant's trust."

c) "The official character in which moneys are received or held is the proper criterion of whether or not they are 'public moneys' under said section 424. Ultimate ownership is not a proper criterion." (*People v. Griffin* (1959) 170 CA2d 358, 363)

F. Without authority of law

Public agencies derive their power from statutes or charters. For example, a city council of a charter city derives its power and authority from the various charter provisions. A city council of a general law city derives its authority from the Government Code. Any decision made by a city council that expends public funds must be authorized by charter or statute.

a) "We start with the general principle that expenditures by an administrative official are proper only insofar as they are authorized, explicitly or implicitly, by legislative enactment. Contrary to defendant's contention below, such executive officials are not free to spend public funds for any 'public purpose' they may choose, but must utilize appropriated funds in accordance with the

legislatively designated purpose. 'It is the policy of the law in the absence of a clearly negatived intention to have . . . funds authorized for a particular purpose expended for such purpose.' (*Uhl v. Badaracco* (1926) 199 Cal. 270, *Mahoney v. San Francisco* (1927) 201 Cal. 248) (*Stanson v. Mott* (1976) 17 C3d 206, 213)

b) "An expenditure of public funds is regulated solely by constitutional and statutory provisions and must be confined to public purposes. An expenditure of municipal funds is permitted only ". . . where it appears that the welfare of the community and its inhabitants is involved and . . . benefit results to the public." (*Albright v. City of South San Francisco* (1975) 44 CA3d 866, 869)

c) Any use of public funds not authorized by law is a violation of the statute. Because of the essential public interest served by the statute, it has been construed very broadly. (*People v. Groat* (1993) 19 Cal App 4th 1228)

G. Intent Requirement (*Stark v. Superior Court*)

Prior to the *Stark* decision (*Stark v. Superior Court* (2011) 52 Cal.4th 368), the cases addressing the issue held that PC 424(a)(1) was a general intent crime that did not require the prosecution to establish that the defendant knew his or her conduct was without authority of law. For example, the Dillon court stated, "We begin by noting that any such violation is not a specific intent crime. (*People v. Dillon* (1926) 199 Cal. 1)

Thus section 424, subdivision 1, does not require proof of an intent to steal or misappropriate, but rather the intentional doing of an act that results in the misappropriation. (*Dillon*, supra, at p. 7) (*Webb v. Superior Court* (1988) 202 Cal App 3d 872, 918.)

In its decision in *Stark*, the California Supreme Court upheld its previous decision in Dillon, that PC 424 is a general intent crime, but ruled that a prosecution of Penal Code section 424 requires proof that the defendant either knew his or her conduct was without authority of law, or was criminally negligent in failing to know that his or her acts or omissions in appropriating public funds were without authority of law.

Background

Robert Stark was the auditor-controller of Sutter County whose opinion of his authority over budgetary issues differed significantly from that of the CAO. During the 2003-2004 fiscal year, several disagreements arose involving the county budget resulting in the CAO filing a report with the board criticizing Stark's performance as auditor-controller.

The report mentioned five areas: that Stark filed the budget six months late; that he unilaterally amended the budget without board approval; that he claimed to have the authority to approve the rates county departments were charging each other for services; that he withheld overtime pay from county firefighters based on his interpretation of an MOU; and that he unilaterally transferred money from the county's general fund to the Sutter Waterworks District.

As a result of the CAO's report, the grand jury began an investigation of the auditor-controller's office which resulted in a 13 count indictment on various subsections of Penal Code section 424, including subsections (a)(1), (a)(6) and (a)(7), and an accusation listing 15 counts of corrupt misconduct in office under Government Code section 3060. At a Penal Code section 995 motion, the trial court dismissed one count of the indictment and two counts of the accusation.

Following a writ to the appellate court, a petition to the California Supreme Court and a remand back to the appellate court, the appellate court ruled that as to the Penal Code 424 counts in the indictment, the prosecution must prove that the defendant knew that his acts or omissions in appropriating public funds were without authority of law. Curiously, the defense never argued that a violation of Penal Code section 424(a)(1) requires that the public funds be appropriated for the defendant's own use or the use of another, an element apparently lacking in this prosecution.

On review, the Supreme Court reaffirmed that various subsections of 424 are general intent crimes but held that general intent crimes often require some knowledge requirement. Because "an act is unlawful only if done with wrongful intent," the Court reasoned that "wrongful intent requires that a defendant know the material facts."

1. Presence or absence of legal authority

In discussing the specific elements of section 424, the court noted that it is not simply the appropriation or transfer of public funds that is a crime, it is the appropriation or transfer without authority of law. Therefore, the presence of absence of some legal authority is a material fact that the prosecution must prove.

a) The Court noted that section 424 is unusual in that the "authority of law" may include non-criminal laws regulating the manner in which public funds may be expended or allocated. The Court referred to these as "nonpenal laws." Public officers charged with the disbursement or safekeeping of public funds may be specifically subject to these nonpenal laws.

b) In some situations section 424 could be violated by appropriating public funds in a manner expressly prohibited by a nonpenal law, whereas in others it could be violated by the appropriation of public funds when there is no nonpenal law that specifically authorizes the expenditure or allocation.

2. Mental element as to presence or absence of legal authorization

The Court went on to hold that "our own recent jurisprudence compel the conclusion that section 424(a)(1), (6), and (7) must be construed to include a mental element as to the presence or absence of legal authorization or obligation."

a) The Court held that "the People must prove, as a matter of fact, both that legal authority was present or absent, and that the defendant knew of its presence or absence." The prosecution does not have to prove that the defendant was aware of the specific statute prohibiting his actions, or that his conduct was criminal; only that he "knew generally that a nonpenal law required or prohibited his conduct." As in any other case, this knowledge can be established by circumstantial evidence.

b) Although not addressed in *Stark*, there are cases in which the law prohibiting the appropriation will be a penal law as opposed to a nonpenal law. For example, a public officer who misappropriates public funds to his own use by committing theft should be aware that stealing money is without authority of law.

3. Criminal negligence

In recognizing the problems inherent in a rule requiring that the prosecution prove actual knowledge in every case involving a charge of Penal Code section 424, the Court noted, "a strict actual knowledge standard would impair effective enforcement" and "it would defy the exacting nature of the statute if one could escape criminal liability by claiming lack of subjective knowledge in circumstances that are objectively unreasonable." As a result, the Court expanded the intent requirement to include a standard where liability could be based on criminal negligence.

a) The Court did not specifically define criminal negligence as it would apply to a charge of 424 other than to generally state that criminal negligence refers to a higher degree of negligence than is required to establish liability in a civil case. **The negligence must be aggravated, culpable, gross, or reckless.**

b) Even though the Court did not provide a definition for criminal negligence, other than aggravated, culpable, gross, or reckless, language in the opinion provides a number of factors that should be considered in determining whether a defendant charged with 424 has acted in a reckless manner. The opinion emphasized the high standard that those who safeguard public funds are expected to maintain, and the duty imposed upon them to become acquainted with any nonpenal laws that pertain to them.

4. Duty of compliance

In referring to its previous decision in *Dillon*, the Court noted that the legislature intended to hold those charged with the safekeeping of public funds in "strict compliance with law," and that those entrusted with public funds are expected to "be aware of and indeed embrace the duties the law imposes upon them."

In discussing the responsibilities inherent in those dealing with public funds, the Court stated, "public officers and others entrusted with safekeeping of public funds have voluntarily assumed the duties that require their action. They seek out and accept these obligations. They must be aware that the government positions they accept come with legal obligations."

a) It is because of these legal obligations that public officers can be held to a standard of criminal negligence. "Stated another way, those who willfully accept the responsibility to manage or handle public money cannot remain recklessly ignorant of the nonpenal law regulating their actions. Rather, 'duty requires the person to acquaint himself with the facts.'"

b) Since these public officers are under such a duty, criminal negligence could be established by the public officer "failing to conduct research that would inform them of their duties, or by failing to seek the advice of persons who could provide that information."

5. Subjective belief defense must be objectively reasonable

The Court created a defense for those public officers who make good faith mistakes in handling public funds or who "subjectively believe their actions or omissions are authorized by law." Those officers are protected from criminal liability, unless that subjective belief is objectively unreasonable, "i.e., is the product of criminal negligence in ascertaining legal obligations."

a) A public officer who conducts the appropriate research, or who seeks advice, and then subjectively, and in reasonable good faith, relies on that information or advice, cannot be prosecuted even if his actions resulted in the appropriation of public funds in direct violation of a nonpenal law.

b) According to the Court, what is objectively reasonable will depend on the position the public officer holds. "Thus, while the criminal negligence standard remains the same, its application will necessarily be measured by what is objectively reasonable for the particular person in the defendant's position." Therefore, an elected city official or appointed city manager will be held to a higher standard than a low level public employee.

6. What conduct constitutes criminal negligence?

What is not entirely clear, and what will have to be developed further through appellate decisions, is what conduct by the defendant will be sufficient to establish criminal negligence. The decision does seem to create a duty on those entrusted with the safekeeping of public funds to become familiar with the nonpenal laws that affect them.

What is not specifically stated, but seems to be implied, is that the failure to take any action to become aware of those nonpenal laws by conducting research "that would inform the official of his duties" or by seeking the "advice of persons who could provide that information," constitutes criminal negligence. Future appellate rulings will be needed to clarify this.

7. Advice of counsel defense

The *Stark* decision does create a defense to a 424 prosecution that was heretofore unavailable: advice of counsel.

a) As the *Chacon* decision confirmed, reliance on the advice of counsel is not a defense to a general intent crime. Post *Stark*, section 424 remains a general intent crime, but advice of counsel obviously becomes a factor in the defendant's subjective belief that his actions were authorized. The reasonableness of that advice, and the defendant's official position, would become factors in determining whether the defendant's belief was objectively reasonable.

b) Since the defendant's official position is a consideration in whether or not his belief is objectively reasonable, it remains to be seen whether an elected council member could rely solely on the advice of the appointed city attorney in making fiscal decisions, or if he would still be required to conduct "appropriate research." This

would become important in situations in which the advice is contrary to a specific nonpenal law.

8. Proving criminal negligence

a) The prosecution will have to prove that the defendant's actions were either specifically prohibited by a nonpenal law or that there was no nonpenal law authorizing his actions.

b) Additionally, the prosecution will have to prove that the defendant either knew that his actions were unauthorized, or that he was criminally negligent in not knowing.

c) If the defendant raises the defense that he subjectively believed his actions were authorized, that belief will have to be objectively reasonable, taking into consideration the position held by the public officer. In other words, if the defendant is a city council member, he will be held to the standard of a reasonable council member.

9. Use of public money without authority of law (P.C. 424 (a)(2))

Although the *Stark* opinion only addressed subsections (a)(1), (a)(6) and (a)(7), subsection (a)(2) also includes a "without authority of law" element. Therefore, the holding would be equally applicable to prosecutions under this subsection.

10. Knowingly keeps a false account (P.C. 424(a)(3))

The *Stark* decision specifically concluded that subsection (a)(3) requires proof only that the defendant acted "knowingly" and does not require any additional evidence of knowledge to sustain a conviction. Subsection (a)(3) should be considered in cases involving the falsification of time cards.

11. Proof of fraud in account handling (P.C. 424(a)(4))

Subsection (a)(4) prohibits the "fraudulent" altering, falsifying, concealing, destroying or obliterating of an account. It is the only subsection in P.C. 424 which requires a specific intent.

a) In any case involving a public officer who destroys, alters or falsifies a public record, consider Government Code §6200, a felony which does not require a fraudulent intent. Section 6201 of the Government Code applies to those who are not public officers.

b) The term "account" may mean, among other things, a statement or record of financial transactions, reckoning or computation, or a registry of pecuniary transactions. (*People v. Marquis* (1957) 153 CA2d 553.)

12. Transfer of public moneys (P.C. 424 (a)(6))

In a prosecution under subsection 424(a)(6), a willful omission to transfer public moneys when transfer is required by law, it is not necessary for the prosecution to show that the defendant had an evil intent to defraud the county to gain something for himself. (*People v. Johnson* (1936) 14 CA2d 373.)

III. Specific Types Of Expenditures

A. Compensation

a) City councils have the authority, pursuant to Government Code §36506, to fix the salaries of city officers and employees. If they exercise discretion and act in good faith, the decision is not subject to review by the court. (*Mitchell v. Walker* (1956) 140 CA2d 239.)

But, California Constitution Article XI §10 states: "A local government body may not grant extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part, or pay a claim under an agreement made without authority of law."

Therefore, any increase in salary during the term of an employment contract, without consideration, would be an illegal gift of public funds.

b) Payment for work not performed is a misuse of public funds. "Salaries are 'public moneys' within the meaning of section 424, and . . . one who authorizes the illegal payment of salaries has violated that section." (*People v. Battin*, supra, 77 Cal.App.3d at p. 650, holding that a County Supervisor's use of his county-paid staff in his political campaign for nomination as Lieutenant Governor constituted a misuse of public funds.) As the court stated in *People v. Groat*: "There is certainly no authority of law for the payment of public funds as salaries for work never performed."

c) Government Code §36516 sets forth the salary schedule, based upon population, for city council members of general law cities. The salaries of council members can be increased by ordinance, but only up to 5% per year.

An ordinance which includes automatic salary increases is illegal. An increase (or decrease) may be approved at a municipal election by a majority of the voters. An increase by municipal election is not limited to the 5%.

An increase to a council member's salary cannot become effective during the council member's current term. There is an exception for councils with "staggered" terms. In that situation, all council members can receive a salary increase at the time that any one of their members starts a new term. (GC §36516.5)

d) According to subsection (d) of §36516, compensation includes payment for service by a city council member on a commission, committee, board, authority, or similar body on which the city council member serves. If the other statute that authorizes the compensation does not specify the amount of compensation, the maximum amount shall be one hundred fifty dollars ($150) per month for each commission, committee, board, authority, or similar body.

e) California Health and Safety Code §34130.5(b) sets the compensation for redevelopment agency members at $75 per meeting, or at $150 per meeting if the agency is also meeting as the housing authority.

f) When council members serve on other city agencies, such as the redevelopment agency, the council and the agency are considered to be two different government entities with distinct duties and powers.

"Well-established and well-recognized case law holds that the mere fact that the same body of officers acts as the legislative body of two different governmental entities does not mean that the two different governmental entities are, in actuality, one and the same. (*Pacific States Enterprises, Inc. v. City of Coachella* (1993) 13 Cal.App.4th 1414, 1424).

As a result, the California Attorney General has opined in 83 Ops.Cal.Atty.Gen. 215 the payment of compensation to an agency member for a meeting at which no agency business was conducted would not be authorized by law.

g) In cases where it is suspected that city agencies were created as a mechanism to increase council members' compensation, a review of council/agency agendas and minutes should be conducted to determine whether the agencies are actually conducting the public's

business. If the ordinance or resolution that authorized the compensation for the agency members provides for a per meeting rate, meetings at which no business is conducted could provide the basis for a prosecution pursuant to PC 424. Obviously, the ratio of compensation paid to business conducted would be the critical factor in determining the appropriateness of criminal prosecution.

h) School board members are entitled to compensation pursuant to California Education Code section 35120 based upon the average daily attendance for the previous year. The statute provides that members who do not attend all of the meetings held in a given month can only receive compensation for the meetings actually attended, unless the board, by resolution, finds that at the time of the missed meeting the board member was performing district-related services. A member can also receive compensation for up to two meetings missed as a result of illness.

B. Benefits

In addition to salary, city council members are also entitled to retirement, health and welfare and social security benefits, as long as those same benefits are also available to the city employees. (GC 36516(e)) The benefits provided to the council members cannot be greater than the most generous benefits received by any category of non-safety employees. (GC 53208.5; GC 53060.1)

a) The term "health and welfare benefit" is defined in Government Code §53200(d) as "one or more of the following: hospital, medical, surgical, disability, legal expense or related benefits including, but not limited to, medical, dental, life, legal expense, and income protection insurance or benefits, whether provided on an insurance or a service basis, and includes group life insurance as defined in subdivision (b) of this section."

b) Like any other form of compensation, any change in benefits cannot take effect during a member's current term, unless the members serve staggered terms. (73 Ops.Cal.Atty.Gen. 296; GC §36516.5)

c) Government Code section 53208 authorizes school board members, as well as elected members of other legislative bodies, to receive health and welfare benefits to the same extent, and with the same restrictions, as city council members.

C. Expense reimbursement

a) Government Code §36514.5 allows city council members to be reimbursed for actual and necessary expenses incurred in the

performance of official duties. Reimbursement for those expenses is subject to Government Code sections 53232.2 and 53232.3, which became effective in January of 2006.

b) Government Code §53232.1 authorizes local agencies to compensate members of a legislative body for attendance at legislative body meetings, advisory board meetings and conference or organized educational activities (subject to Gov. Code §53232.2(c)).

   Local agencies may compensate members for attendance at occurrences other than those specified only if the body has adopted, in a public meeting, a written policy specifying which occurrences constitute performance of official duties. The statute does not apply to those agencies that pay compensation in the form of salary to the members of its legislative body.

c) Government Code §53232.2 requires an agency, if it reimburses its members for actual and necessary expenses, to adopt a written policy at a public meeting specifying the types of occurrences that qualify for reimbursement. The written policy must specify the reasonable reimbursement rates for expenses or the agency will be required to use the IRS rates for reimbursement.

   The statute places limitations on the amount the agency can reimburse for certain expenses. For example, lodging at a conference or educational activity cannot exceed the maximum group rate published by the conference or activity sponsor. If the group rate is not available, the agency members must use comparable lodging.

   The agency members are also required to use government and group rates for transportation and lodging, when available. Additionally, all expenses that do not fall within the written policy or the IRS guidelines must be approved by the legislative body at a public meeting.

d) Government Code §53232.3 requires the agency to provide expense report forms to be filed by the members being reimbursed. The report must be submitted within a reasonable time after incurring the expense. The reports are considered public records subject to disclosure pursuant to the Public Records Act. In addition to the written report, the member shall provide a brief report, at the next regularly scheduled meeting of the agency, on meetings attended at the expense of the agency.

To be reimbursable, the expense must: (1) be an expense of a member of a city council; (2) be an "actual" expense; (3) have been incurred in the performance of official duties; (4) be a "necessary" expense. (65 Cal.Ops.Atty.Gen. 517)

e) For an expense to be considered "necessary" there must be some connection between the services being reimbursed and the performance of official duties. In *California Teachers Assn. v. Board of Trustees* (1977) 70 Cal.App.3d 431, 435 the court held: "Necessity connotes that which is indispensable, necessary, unavoidable because compelled, a requisite, required by social or legal compulsion or imperative need. Perhaps a good working definition is something that cannot be done without."

In 65 Ops.Cal.Atty.Gen 517, the Attorney General opined: "'necessary' suggests a relationship of dependence. In the context of section 36514.5, this would mean that the performance of official duty is dependent upon incurring the expense in question. Yet the courts have not required a necessity in any absolute sense.

In *Collins v. Riley*, supra, necessary traveling expenses were held to include an expenditure for hotel room and meals when traveling away from home on public business. It is physically possible to perform official duties at remote points without expenditures for hotel rooms and meals. One could carry meals from home and sleep in the car, though this may not be convenient or very practical.

The Collins case indicates that practical necessity is all that is required under the reimbursement statutes--a practical need based upon the prevailing business practices."

f) The California Attorney General has opined that in order for a local agency to reimburse a member for expenses incurred in attending a conference, there must be "a clear nexus" between attendance at the conference and the performance of the member's statutorily mandated service. (61 Ops.Cal.Atty.Gen 478.)

g) A city cannot pay council members a set monthly reimbursement for miscellaneous un-itemized expenses incurred in the performance of their official duties, absent a valid ordinance or resolution determining that the amount was actually and necessarily expended each month. "In the absence of a valid ordinance or resolution, a flat expense allowance to the extent that in any one month it exceeds amounts actually expended for a verifiable municipal purpose is the equivalent of a gift of public funds, in contravention of section 25, article XIII, of the California

Constitution." (*Albright v. City of South San Francisco* (1975) 44 CA3d 866, 870)

h) Government Code §50023 allows the expenditure of public funds for representatives of local agencies to attend the Legislature or Congress, or to meet with representatives of those bodies, regarding legislation which may affect the local agency.

The funds of a general law city may not be lawfully expended to reimburse city officials for their expenses in buying meals for third parties such as constituents, legislators or private business owners, at meetings held to discuss legislation or other matters of benefit to the city. (85 Ops. Cal. Atty Gen. 210.) In other words, a city council member could be reimbursed for travel expenses incurred in lobbying a state legislator, but he or she could not be reimbursed for purchasing a meal for the legislator.

The Attorney General had previously opined that **may not be lawfully expended to reimburse county officers and employees for their expenses in buying meals for legislators or their aides at meetings to discuss legislation of interest to the county.** (66 Ops. Cal. Atty Gen. 186.)

i) A 1992 Attorney General opinion (75 Ops. Cal. Atty. Gen. 20) states that it is a gift of public funds for a hospital district to pay the travel expenses of the spouse of one of the agency's directors. The same argument could be made for spouses of the elected officials of other public agencies.

j) California Health & Safety Code §34130.5 allows for community development commissioners to receive reimbursement for expenditure of actual and necessary expenses, including travel.

As to what constitutes an "actual and necessary" expense, the California Attorney General in 61 Ops.Cal.Atty.Gen. 303 opined that those expenses "deemed to be for the benefit of and in the best interest of" the public agency were appropriate. Any expense which does not appear to be necessary to the performance of the officer's official duties should be closely reviewed.

k) There are a number of different types of water districts in California governed by various sections of the Water Code. Water Code §30507, which applies to county water districts, sets the salaries of the directors of those districts and allows for the reimbursement of expenses. That statute references Government Code 53232, et seq. Water Code §71255 is a similar statute which applies to the elected directors of municipal water districts.

l) California Education Code §44032 provides: "The governing board of any school district shall provide for the payment of the actual and necessary expenses, including traveling expenses, of any employee of the district incurred in the course of performing services for the district, whether within or outside the district, under the direction of the governing board."

D. Gifts

California Constitution Article 16 Section 6 prohibits gifts of public funds. Therefore any gift of public funds would be an appropriation, transfer, use, or loan not authorized by law.

E. Use of public resources for personal use

California Government Code §8314 prohibits public employees from using public resources for personal purposes, or other purposes not authorized by law.

a) "Personal purpose" is defined as "those activities the purpose of which is for personal enjoyment, private gain or advantage, or an outside endeavor not related to state business. 'Personal purpose' does not include the incidental and minimal use of public resources, such as equipment or office space, for personal purposes, including an occasional telephone call."

b) The statute defines "public resources" as "any property or asset owned by the state or any local agency, including, but not limited to, land, buildings, facilities, funds, equipment, supplies, telephones, computers, vehicles, travel, and state-compensated time." "Use" means a "use of public resources which is substantial enough to result in a gain or advantage to the user or a loss to the state or any local agency for which a monetary value may be estimated."

c) Government Code §8314 is not a criminal statute, but a use of public resources in violation of that section could constitute a violation of Penal Code §424 if, as in *Sperl*, the use of public resources resulted in the officer authorizing the expenditure of public funds for a personal purpose.

F. Use of public resources for campaign purposes

California Government Code §8314 also prohibits public employees from using public resources for campaign activities.

"Campaign activity" means an activity constituting a *contribution* as defined in Government Code §82015, or an *expenditure* as defined in Government Code §82025 of the Political Reform Act. Since those two sections of the Political Reform Act regulate election campaigns, it follows that election campaigns are the type of campaign activity referred to in 8314.

Specifically excluded from the definition of campaign activity is "the incidental and minimal use of public resources, such as equipment or office space, for campaign purposes, including the referral of unsolicited political mail, telephone calls, and visitors to private political entities." "Use" has the same meaning as defined above.

1. Informational Activities

a) Subsection (d) of Government Code §8314 states: "Nothing in this section shall prohibit the use of public resources for providing information to the public about the possible effects of any bond issue or other ballot measure on state activities, operations, or policies, provided that (1) the informational activities are otherwise authorized by the constitution or laws of this state, and (2) the information provided constitutes a fair and impartial presentation of relevant facts to aid the electorate in reaching an informed judgment regarding the bond issue or ballot measure.

b) Government Code §54964, which is very similarly worded to §8314, prohibits employees or consultants of a local agency from expending agency funds to support or oppose a ballot measure or candidate. As with section 8314(d), subsection (c) of 54964 states that the statute does not prohibit the expenditure of public funds to provide information to the public of the possible effects of a ballot measure, so long as the information provided is fair and impartial.

2. Informational v. campaign purposes

The issue in these types of cases will hinge on whether the funds were spent for "informational" versus "campaign" purposes pursuant to Government Code 8314(d).

a) Funds that are allocated by a public agency to provide voters with information on upcoming elections do not constitute a misuse of public funds. On the other hand, if the funds are spent in an attempt to sway the voters to vote in a particular way, a violation occurs. This issue arises frequently in situations where a city council is attempting to get voter approval for a utility tax increase. As discussed in the *Stanson* and *Vargas* cases below, the style,

tenor and timing of the publication will determine whether a violation occurred.

b) "Problems may arise, of course, in attempting to distinguish improper "campaign" expenditures from proper "informational" activities. With respect to some activities, the distinction is rather clear.

Thus, the use of public funds to purchase such items as bumper stickers, posters, advertising "floats," or television and radio "spots" unquestionably constitutes improper campaign activity (see, e.g., *Mines v. Del Valle*, supra, 201 Cal. at p. 276; *Porter v. Tiffany*, supra, 502 P.2d at p. 1386), as does the dissemination, at public expense, of campaign literature prepared by private proponents or opponents of a ballot measure. (See 51 Ops.Cal.Atty.Gen. 190, 194 (1968); *Stern v. Kramarsky*, supra, 375 N.Y.S.2d 235.)

On the other hand, it is generally accepted that a public agency pursues a proper "informational" role when it simply gives a "fair presentation of the facts" in response to a citizen's request for information." (*Stanson v. Mott* (1976) 17 C3 206, 221.)

c) "Frequently, however, the line between unauthorized campaign expenditures and authorized informational activities is not so clear.

Thus, while past cases indicate that public agencies may generally publish a 'fair presentation of facts' relevant to an election matter, in a number of instances publicly financed brochures or newspaper advertisements, which have purported to contain only relevant factual information, and which have refrained from exhorting voters to "Vote Yes," have nevertheless been found to constitute improper campaign literature. (See 35 Ops.Cal.Atty.Gen. 112 (1960); 51 Ops.Cal.Atty.Gen. 190 (1968); cf. 42 Ops.Cal.Atty.Gen. 25, 27 (1964).)

In such cases, the determination of the propriety or impropriety of the expenditure depends upon a careful consideration of such factors as the style, tenor and timing of the publication; no hard and fast rule governs every case." (*Stanson v. Mott* (1976) 17 C3 206, 222.)

d) Any confusion between the rule in *Stanson*, prohibiting the expenditure of public funds on campaign activities, and the statutory language in section 54964, which appears to authorize the expenditure of public funds for informational purposes, was clarified in *Vargas v. City of Salinas* (2009) 46 C4th 1.

In *Vargas*, the appellate court ruled that section 54964 authorized the expenditure of public funds on communications as long as they do not "expressly advocate" the approval or rejection of a ballot measure or candidate. The Supreme Court disagreed, holding that 54964 does not affirmatively authorize or permit the expenditure of public funds on communications that constitute "campaign activities" even if they do not "expressly advocate" the approval or rejection of a ballot measure or candidate.

In other words, the expenditure of public funds on "campaign activities," regardless of the content, was still prohibited.

e) The Supreme Court went on to find that nothing in the legislative history of section 54964 (which was passed after the Stanson case was decided) indicated an intention by the legislature to abrogate the ruling in Stanson, or to approve the expenditure of public funds on activities that would constitute campaign activities as defined in Stanson.

The court found that there is a difference between activities that are clearly informational and those that are campaign activities as prohibited by *Stanson*.

As stated in Stanson, sometimes the style, tenor and timing of a communication or activity will determine whether it is informational activity or campaign activity. Certain activities are still prohibited by *Stanson* even if they do not "expressly advocate" a position or candidate, such as bumper stickers, posters, advertising floats or television and radio spots, because those activities constitute "campaign activities." Campaign activities, even if fair and neutral, are prohibited if paid for with public funds.

f) Government Code sections 50023 and 53060.5 specifically allow the expenditure of public funds for the purpose of lobbying legislators on pending legislation on issues beneficial to a local agency or district. The public funds may only be spent to lobby legislators, not to lobby voters for support.

"It is one thing for a public agency to present its point of view to the Legislature. It is quite another for it to use the public treasury to finance an appeal to the voters to lobby their Legislature in support of the agency's point of view." (*Miller v. Miller* (1978) 87 Cal.App.3d 762)

As discussed above, any communication with the voters must not advocate, but merely provide a fair representation of relevant information.

g) Neither Government Code §54964 nor Government Code §8314 are criminal, but a violation could constitute a violation of Penal Code §424 as being an expenditure not authorized by law. Section 54964 does not apply to school officers or employees.

In cases in which a school officer or employee is alleged to have used public funds for a political purpose, Education Code §7054 is the appropriate statute. Section 7054 prevents the expenditure of school district funds to support or oppose a ballot measure or candidate. Unlike sections 8314 or 54964, section 7054 is a criminal statute, violation of which is a felony.

h) Expenditures of public funds for other political purposes, for example using public employees to work on political campaigns during work hours, have been found to violate Penal Code section 424. "Thus, defendant's diversion of county employees to the performance of tasks in aid of his personal political campaign amounted to a use of public money for a 'purpose not authorized by law.'" (*People v. Battin* (1978) 77 CA3d 635.)

In *People v. Sperl* (1976) 54 CA3d 640, the misappropriation consisted of county funds in the form of salaries for personnel performing political activities which were clearly outside the scope of their proper duties resulting in a monetary loss to the county.

3. Summary

When analyzing a complaint that a public agency is misusing public funds for a political purpose, the specific political purpose for which the funds are expended is an important factor. There is a distinction in the law between funds spent to support or oppose a candidate or ballot measure, and those spent lobbying for or against proposed legislation.

While Ed. Code §7054 and Government Code §54964 specifically prohibit the expenditure of public funds for the purpose of supporting or opposing a ballot measure or candidate, Gov. Code §50023, Gov. Code §53060.5 and *Stanson v. Mott* allow the expenditure of public funds to lobby for or against proposed legislation which will affect the public agency expending the funds. This includes the hiring of lobbyists and the expenditure of public funds to pay the expenses of agency members for the purpose of lobbying the legislature.

G. Non-agency related expenditures

Obviously, any expenditure of public agency funds that is not related to furthering the official goals or purposes of the agency is unauthorized.

a) In *People v. Vallerga* (1977) 67 CA3d 847, a county assessor was convicted of a violation of Penal Code §424 for purchasing airline tickets with county funds for the purpose of providing private consulting services for personal financial gain.

b) Although agencies can reimburse agency members for agency related travel expenses, travel expenses for spouses of agency members would not be an authorized expenditure.

In 75 Op. Atty Gen. Cal. 20 (1992), the California Attorney General opined that a hospital district may not pay the traveling and incidental expenses incurred by the spouse of a hospital director who is attending a conference related to hospital business.

H. Payment of legal defense fees

Public agencies are not required to pay for the criminal defense costs for members who are under investigation or charged with a crime. This includes proceedings brought against a member to remove them for misconduct in office pursuant to Gov. Code §3060. Gov. Code §995.8 allows an agency to pay criminal defense costs if:

1) The criminal action or proceeding is brought on account of an act or omission in the scope of his employment as an employee of the public entity; and

2) The public entity determines that such defense would be in the best interests of the public entity and that the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent interests of the public entity.

Any payment of defense costs by a public agency that does not conform to §995.8 could be an unauthorized expenditure and a violation of Penal Code §424.

I. Government Code §36503.5

Government Code section 36503.5 prohibits an elected city official who is facing a recall election from expending, or participating in any action which would expend, city funds. The prohibition extends from the day of the recall election to the day the election is certified. If the recall of the elected official is successful, the prohibition continues until the successor is declared elected.

This is not a criminal statute, but any expenditure in violation of this statute would be without authority of law and in violation of Penal Code §424.

IV. Defenses

A. Repayment of funds

Repayment of the funds or return of the misappropriated property is not a defense to Penal Code §424. (Penal Code §513; *People v. Costello* (1951) 107 Cal.App.2d 514; *People v. Kranhouse* (1968) 265 Cal App 2d 440.) In *People v. Edwards* (1992) 8 CA4th 1092, an embezzlement case, the court ruled that the defendant had the right to introduce evidence that he had improved the embezzled property while it was in his possession as relevant to his lack of intent to steal. Since intent to steal is not an element of Penal Code §424, this case would be inapplicable.

B. Advice of counsel

As discussed above, Penal Code §424 is a general intent crime. Advice of counsel was previously not a defense to a general intent crime. "The defense of action taken in good faith, in reliance upon the advice of a reputable attorney that it was lawful, has long been rejected. The theory is that this would place the advice of counsel above the law and would place a premium on counsel's ignorance or indifference to the law." (1 Witkin & Epstein, California Criminal Law (3rd Edition, 2000), Defenses, §38 page 369.)

However, pursuant to *Stark v. Superior Court,* advice of counsel must now be considered when deciding whether or not the defendant was criminally negligent.

C. Incidental and minimal use

Although a violation of Penal Code §424 does not require proof of a specific dollar amount (*People v. Battin* (1978) 77 CA3d 635), subsection (c) states: "This section does not apply to the incidental and minimal use of public resources authorized by Section 8314 of the Government Code."

Government Code §8314 states: "The incidental and minimal use of public resources by an elected state or local officer, including any state or local appointee, employee, or consultant, pursuant to this section shall not be subject to prosecution under Section 424 of the Penal Code."

As discussed above, Government Code §8314 prohibits the personal use of public resources and defines "personal purpose" as: "...those activities the purpose of which is for personal enjoyment, private gain or advantage, or

an outside endeavor not related to state business." 'Personal purpose' does not include the incidental and minimal use of public resources, such as equipment or office space, for personal purposes, including an occasional telephone call.

Incidental and minimal use is also mentioned in the section of Gov. Code §8314 defining the types of campaign activity prohibited by the statute: "'Campaign activity' does not include the incidental and minimal use of public resources, such as equipment or office space, for campaign purposes, including the referral of unsolicited political mail, telephone calls, and visitors to private political entities."

Government Code §8314 gives several specific examples of what constitutes "incidental and minimal use." The list should not be considered all inclusive. Prosecutorial discretion should be used to decline charging a violation in situations where the use of public resources does not justify a felony. It should be noted that §8314 refers only to the use of public "resources" and does not place a minimum threshold amount on the misappropriation of public "funds."

D. Statute of limitation

Violations of Penal Code §424 fall within the category of crimes included in Penal Code §803(c):

"A limitation of time prescribed in this chapter does not commence to run until the discovery of an offense described in this subdivision. This subdivision applies to an offense punishable by imprisonment in the state prison, a material element of which is fraud or breach of a fiduciary obligation, the commission of the crimes of theft or embezzlement upon an elder or dependent adult, or the basis of which is misconduct in office by a public officer, employee, or appointee, including, but not limited to, the following offenses..."

a) As such, Penal Code §801.5 requires that prosecution commence within four years of the completion of the crime or four years from the date the crime is discovered, whichever occurs later. The statute begins to run upon discovery of the crime by either the victim or the responsible law enforcement agency. Reasonable diligence excuses non-discovery. (*People v. Swinney* (1975) 46 CA3d 332.)

b) The statute begins running upon the discovery that a crime has occurred, not just the discovery of a loss. "Discovery of a loss, without discovery of a criminal agency, is not enough." (*People v. Swinney* (1975) 46 CA3d 332, 340.)

c) In cases involving the misuse of public funds from a government agency, the statute begins running upon discovery of the crime by "a public employee occupying a supervisorial position who has the responsibility to oversee the fiscal affairs of the governmental entity and thus has a legal duty to report a suspected crime to law enforcement authorities." (*People v. Lopez* (1997) 52 CA4th 233, 247). This, of course, presumes that the supervisor is not a suspect.

   At footnote 6, the Lopez court stated: "In the unlikely event that there is no such supervisor or in cases in which the supervisor either is the accused or aided and abetted the accused or conspired with him, the statute starts to run upon discovery by law enforcement authorities. Although Aguilera invoked his privilege against self-incrimination on the advice of his counsel, there was no evidence that he aided and abetted defendant or that he conspired with him to commit the charged offenses."

d) It is questionable whether violations of Penal Code §424 fall within the category of crimes described in Penal Code §799 as "embezzlement of public money" which are capable of being commenced at any time. That issue was examined in *People v. Holtzendorff* (1960) 177 CA2d 788, and the court held, at page 795, "...we conclude that a violation of either of the first two subdivisions of section 424 does not constitute embezzlement." That court upheld the lower court's granting of a 995 motion as to 42 counts of Penal Code §424 because the crimes were outside what at that time was a three year statute of limitations. The court reversed the lower court's ruling dismissing a like number of counts alleging Penal Code §504 as falling within Penal Code §799 and not subject to a statute of limitations.

   However, the California Law Commission comments to the 1984 revision of Penal Code §799 states: "Section 799 replaces former Section 799 with the rule that there is no limitation period for capital crimes or crimes punishable by life imprisonment (with or without the possibility of parole), or for embezzlement of public money. This rule preserves former law as to murder (Section 187), kidnapping for ransom (Section 209), and embezzlement of public money (Section 424)." (Emphasis added).

e) In situations in which prosecution of Penal Code §424 is barred by the four year statute of limitations, consider whether the facts justify a filing of Penal Code §504, embezzlement of public funds. Since there is no statute of limitations for embezzlement of public funds, a Zamora allegation, as discussed below, would not be required.

A four year statute of limitation would still apply in cases in which a public employee, not meeting the definition of a "public officer," steals public funds. Grand theft, in violation of Penal Code §487, is one of the crimes included in subsection (c) of Penal Code §803. Pursuant to Penal Code §801.5, the statue would begin to run upon the commission of the crime or discovery, whichever occurs later.

E. Zamora allegation

When filing a complaint alleging a violation of Penal Code §424 which occurred over four years earlier, in other words, where the complaint on its face indicates the statute of limitations pursuant to Penal Code §801.5 has already run, the complaint must contain a so-called Zamora allegation.

People v. Zamora, 18 C3d 538, requires in such situations that the pleading allege facts showing that the prosecution is not barred by the statute of limitations. The pleading must include: (1) the date on which the offense was discovered; (2) how and by whom the offense was discovered; (3) lack of knowledge, both actual and constructive, prior to the date of discovery; (4) the reason why the offense was not discovered earlier.

The Zamora court also concluded that the trial court has the discretion to hold an evidentiary hearing to determine whether the statute of limitations bars the prosecution of the case prior to the matter going to trial. At that hearing one of the issues to be determined is whether the reasonable diligence requirement has been met. Even if the prosecution prevails at such a hearing the ultimate issue of whether the statute has run must be decided by the jury if still in dispute.

F. Legislative immunity

The issue of legislative immunity as a defense to a charge of Penal Code 424 may arise in cases in which a member of a legislative body casts a vote which results in a misappropriation of public funds. There are no California cases which hold that any such immunity exists in a criminal prosecution for Penal Code 424. There are, however, cases that discuss legislative immunity as it relates to civil lawsuits brought against members of legislative agencies for misappropriation of public funds and whether or not the officials can be held personally liable.

a) The California Supreme Court in *Stanson v. Mott* (1976) 17 C3d 206, ruled "that such officials must use 'due care,' i.e., reasonable diligence, in authorizing the expenditure of public funds, and may be subject to personal liability for improper expenditures made in the absence of such due care." This "due care/reasonable diligence"

standard should be considered when determining whether to file criminal charges.

As stated above, a Penal Code §424 prosecution requires no showing of bad faith on the part of the defendant, but a public official who exercises reasonable diligence in casting a vote and still violates Penal Code §424 should not be criminally prosecuted absent some showing of personal gain.

Although no court has held that legislative immunity applies in a Penal Code 424 prosecution, in the case of *D'Amato v. Superior Court of Orange County* (2009) 167 CA4th 861, 876, the appellate court ruled "the Legislature intended section 1090's 'financial interest' element as a limitation on a prosecutor's intrusion into the legislative arena. Accordingly, we hold that the separation of powers doctrine bars criminal prosecution of a public official for aiding and abetting another's section 1090 violation based on that official's legislative activities where the official does not hold a personal financial interest in the contract at issue." The legislature did not intend to criminalize legislative acts taken by public officials who held no personal financial interest in a public contract made in violation of section 1090.

The court held that the separation of powers doctrine prohibits the executive branch from "using a generally applicable criminal statute to oversee legislators or judges in the performance of their legislative or judicial duties, and thereby impinge on their ability to function independently. This is not to say that the Legislature is prohibited from criminalizing specific legislative acts of a municipal legislative body." (Ital. added). The *D'Amato* court recognized an exception to legislative immunity mentioned in *Steiner* ((50 CA4th 1771)) which can arise when a legislative body's actions violate a specific criminal statute.

The reasoning in *D'Amato* was that the legislative intent in drafting Gov. Code 1090 was to limit "executive interference" by excluding from prosecution those members of the legislative body that did not have a financial interest in the contract. Unlike Gov. Code 1090, Penal Code 424 is not limited to those who misappropriate public funds only to their own use.

b) An argument can be made in Penal Code 424(a)(1) cases that the language of the statute, which prohibits the appropriation of public moneys for the perpetrator's own use "or to the use of another," authorizes a prosecution for a legislative body member who votes to appropriate public funds to the use of another without authority of law. The same can be argued for a prosecution pursuant to

subsection (a)(2) of a legislative action which loans public funds to another without authority of law.

V. Consequences Of Conviction

The punishment for a conviction of a violation of Penal Code §424 is two, three or four years in state prison and disqualification from holding any office in the state. Pursuant to Government Code §1770.2, the suspension from office occurs immediately upon a plea of guilty or nolo contendere or upon a guilty verdict. The official is not entitled to remain in office pending appeal of his or her conviction. He or she may be restored to office only if the court sets aside the plea or verdict prior to judgment being entered.

a) Pursuant to Penal Code §514, a conviction for embezzling public funds is punishable by imprisonment in state prison and ineligibility from holding "any office of honor, trust or profit in this state."

   As to what constitutes "any office" for disqualification purposes, see the Attorney General Opinion at 73 Ops.Cal.Atty.Gen. 69: "It has been held that a public office normally is (1) created by the Constitution or by statute, (2) with a fixed term provided by statute, (3) as well as all duties and its compensation specified by statute, and (4) a required oath of office and official bond given by (5) a person designated as an "officer," (6) who is elected or appointed (7) to perform "important" duties, by exercising judgment and discretion, including the setting of policy, (8) that constitutes some sovereign function of government undertaken on behalf of the public."

   While not all of these characteristics of a public office are critical to its existence, there are "two essential elements: (1) an office which is not transient, occasional or incidental but is itself an entity in which incumbents succeed one another, and (2) the delegation to the office of some portion of the sovereign functions of government, either legislative, executive or judicial. [Citations.]"

b) Penal Code §424, prohibiting the use of public funds for purposes not authorized by law, and providing that a person convicted thereunder is disqualified from holding any public office, does not require a showing that the act involved moral turpitude. (*People v. Battin* (1978) 77 CA3d 635.)

c) State prison is the presumptive sentence for a violation of Penal Code §504 committed by a public official. Penal Code §1203(e)(7) states: "Except in unusual cases where the interests of justice

would best be served if the person is granted probation, probation shall not be granted to any of the following persons:

...(7) Any public official or peace officer of this state or any city, county, or other political subdivision who, in the discharge of the duties of his or her public office or employment, accepted or gave or offered to accept or give any bribe, embezzled public money, or was guilty of extortion."

d) An excellent case discussing what constitutes "unusual cases" is *People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, involving a sheriff convicted of embezzling over $100,000 who was placed on probation by the trial court. The appellate court remanded for resentencing holding that the facts relied on by the trial court did not fit the criteria listed in Rules of Court 413 (since renumbered 4.413.) The court held that rule 4.4.13 is not to be read expansively. Only those factors listed in the rule are to be considered by the court in deciding whether or not to grant probation. For example, the defendant's lack of prior criminality and standing in the community were not proper factors for consideration.

e) For example, the Dorsey court, at page 1227, stated: "Furthermore, it cannot logically be used to avoid the limitation on probation. We think it obvious that public officials and peace officers, as a class -- especially those given access to public money--have previously displayed good character and have little history of serious legal difficulties. If this was enough to take them out of presumptive ineligibility, the enactment of the ineligibility would have little effect."

VI. Filing Considerations

In analyzing a potential Penal Code §424 prosecution, the following factors should be considered:

A. Who was the beneficiary of the expenditure or use of funds?

Obviously, if the target of the investigation, or a friend or relative, benefited financially from the expenditure, a criminal prosecution would be warranted. However, if the expenditure was intended to, and did, benefit those the agency was created to serve, criminal prosecution would probably not be appropriate. This could be true even in a case in which the expenditure was not specifically "authorized by law."

B. What was the motive or intent of the target?

Although intent is not an element of Penal Code §424, an analysis of the target's motive and intent is important in determining whether a felony prosecution is warranted and whether removal from office is appropriate. Obviously, when an intent to steal or defraud can be shown, a felony prosecution would be appropriate. Even though an elected public official did not benefit financially from an unauthorized expenditure, perhaps his or her motivation was political and the expenditure garnered him or her some political benefit.

C. Did the target rely on advice of counsel or other authority?

Although reliance on advice of counsel is not typically a defense to a general intent crime (refer to the section above on defenses), the fact that a public officer may have relied on the opinion of the agency's attorney in making his or her decision to allocate funds should be taken into consideration in determining whether to file criminal charges.

Our mission should not include prosecuting honest public officials who, in attempting to carry out their duties, commit technical violations of the law. Felony prosecution should be reserved for those whose actions are based on corrupt motives or personal gain, either financial or political.

Chapter 3

CONFLICTS OF INTEREST

I. Introduction

A significant number of complaints are received each year by the Public Integrity Division alleging conflicts of interest by public officials and public employees. The vast majority of these complaints allege conduct which is not criminal. In order for a conflict of interest to be criminal, the public official or employee must make or influence an official decision in which he or she has a financial interest. There are two criminal conflict of interest statutes, one misdemeanor and one wobbler, with which public corruption prosecutors should become familiar: California Government Code §87100, the misdemeanor, and Government Code §1090, the wobbler.

Both statutes prohibit official decisions in which a public official or employee has an interest. The difference is that G.C. §1090 has the additional requirement that the official decision involve the making of a contract. Any analysis of a conflict of interest issue should begin with a determination of whether the conflict involves the making of a contract, and then proceed with a thorough analysis of the applicable statutes.

II. Government Code §87100

Government Code §87100 is included in the Political Reform Act (P.R.A.) and states: "No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." Pursuant to the P.R.A., violations of the act can be prosecuted administratively by the Fair Political Practices Commission (F.P.P.C.) and criminally by either the Attorney General, District Attorney or City Attorney of a charter city. (G.C. §91001(a); §91001.5). Public officials who seek advice from the F.P.P.C. may be immune from criminal prosecution if they rely on that advice. (Please see the section of this manual regarding Campaign Issues for a full discussion of the impact that F.P.P.C. advice and opinions have on criminal prosecutions.)

The penalties for a conviction of §87100 include up to six months county jail (P.C. §19), a fine of up to $10,000 (G.C. §91000(b) and a possible four year ineligibility to be a candidate for elective office or a lobbyist (G.C. §91002).

It should be noted that a conviction for a criminal violation of G.C. §87100 does not result in removal from office, nor does it preclude the official from holding office. A conviction merely prohibits the convicted official from

running for office for a period of four years from the date of conviction, unless the judge, at time of sentencing, specifically determines not to enforce that provision. An official precluded from running for public office pursuant to G.C. §91002, who runs for office, is guilty of a felony.

A. Who is a public official

Government Code §87100 applies to "public officials" as defined in §82048. Pursuant to that section, all elected and appointed officials and all employees of state or local government agencies, except judges and court commissioners, are subject to §87100. Consultants who have been delegated decision making authority or participate in making decisions are also covered by the statute. According to the Fair Political Practices Commission (Doreet Rotman Opinion, 10 FPPC 1, 86-001) members of a project area committee are also subject to the requirements of §87100 and are required to file a Statement of Financial Interest.

1. Elected state officers are excluded

Pursuant to Government Code section 87102, elected state officers are specifically excluded from criminal prosecution for violating 87100.

B. Criminal prosecutions

Except in unusual circumstances, it is the policy of the Public Integrity Division to refer violations of §87100 to the F.P.P.C. for administrative proceedings in lieu of filing criminal charges. Those cases in which criminal prosecution may be appropriate would be cases in which the public official is a target in another PID investigation, or his or her conduct is particularly egregious and clearly resulted in a personal financial benefit.

The F.P.P.C. has developed an eight step process for determining whether a public official has violated §87100. (California Code of Regulations, title 2, §18700(b)). This eight step process is quite technical and complicated. Additionally, there are F.P.P.C. opinions upon which the agency relies to determine whether a conflict exists. An in depth discussion of the eight step process can be found in the California Attorney General's Conflict of Interest manual. A copy of the manual is available on the Attorney General's website (http://caag.state.ca.us/publications) and is included as part of this manual.

It should be noted that the California Code of Regulations are rules adopted by state agencies pursuant to the Administrative Procedure Act (G.C. sections 11340 et seq.) and relied upon by the agencies to perform their administrative functions. The regulations are created by the agencies, not passed by the legislature. They are agency rules, not laws.

For purposes of a criminal prosecution of 87100, the regulations and the eight step analysis would not appear to be relevant and should not be included in the instructions given to the jury. The actual statutes should provide sufficient guidance to the jury as to the elements of the crime. Section 87100 clearly states the prohibition against the conflict of interest, G.C. §82048 defines "public official," and section 87103 lists the financial interests to which 87100 applies.

Although not appropriate as part of a criminal prosecution, the eight-step analysis should be included as part of the filing decision. Because public officials rely on the regulations and F.P.P.C. opinions to determine whether their behavior complies with the requirements of section 87100, they should not be criminally prosecuted for conduct which would not be subject to administrative prosecution by the F.P.P.C. Even in cases in which the F.P.P.C. would conclude that a conflict exists the facts may not have sufficient "jury appeal" to warrant a criminal prosecution.

To satisfy the "jury appeal" element, the criminal prosecutor should focus on whether the facts as determined by the investigation are sufficient to persuade a jury beyond a reasonable doubt that the public official directly benefited from the governmental action in which he participated. Proof of a direct financial benefit means evidence that the public official, or his or her spouse, was personally enriched as a direct result of his vote or official decision. A purely technical violation which may survive the eight step analysis but which falls below the standard of proof beyond a reasonable doubt of a direct financial benefit should be referred to the F.P.P.C. for possible administrative action.

C. Conduct prohibited

The conduct prohibited by §87100 is the making of a governmental decision, or an attempt to use one's official position to influence a governmental decision, in which the official knows or has reason to know he has a financial interest. Unlike a civil §1090 violation, which prohibits having the financial interest, §87100 prohibits the governmental action.

There are three areas which have been determined not to fall within the prohibitions of §87100: solely ministerial or clerical functions (Cal. Code Regs., tit. 2, §18702.4(a)(1))., a public official representing himself and appearing before his own agency (Cal. Code Regs., tit. 2, §18702.4(a)(2) and (b)(1))., a public official voting on his own salary or the terms of his employment contract (Cal. Code Regs., tit. 2, §18702.4(a)(3)).

The statute also prohibits a public official from attempting to influence a governmental decision in which he has a financial interest. This also

includes any attempt to influence the decision of an agency appointed by or funded by the official's agency. (Cal. Code Regs., tit. 2, §18702.3(a)).

A conflict exists only if the resulting benefit to the official was foreseeable. In other words, there must be a substantial likelihood, based on all the facts available to the official at the time of the decision, that the benefit would result from the decision. (Cal. Code Regs., tit. 2, §18700(b)(6); §18706(a)).

Also, in order to result in a criminal conflict of interest, the effect of the governmental decision on the official's financial interest must be distinguishable from the effect on the general public. (Cal. Code Regs., tit. 2, §18700(b)(7); §18707(b); §18707.1(b)). In other words, a decision by the official which may benefit him or her financially, but which also benefits "the public generally," does not violate §87100.

This issue will arise in cases in which a governmental decision affects the official's real property or business. Code of Regulations sections 18707(b) and 18707.1(b) provide guidelines for making the required analysis. The ultimate determination whether to file criminal charges should not be based solely on the statutory analysis, but rather on the likelihood that the evidence would convince a jury beyond a reasonable doubt that the official's decision enriched him.

If the governmental decision involves a contract or the purchase or sale of goods or services, consider filing a felony pursuant to G.C. §1090.

D. Financial interest

Government Code §87103 lists the types of financial interests which could give rise to a prosecution pursuant to §87100. Please note that campaign contributions do not constitute a financial interest for purposes of §87100 but gifts do constitute an interest. To avoid liability, a financially interested public official must follow the requirements of Government Code §87105: publicly identify the financial interest, recuse himself from discussions or voting, and leave the chambers until after the matter is resolved.

The following financial interests can subject an official to prosecution for a violation of §87100:

1. Investments in a business

An investment of $2,000 or more in any for-profit business including any corporation, partnership, joint venture or sole proprietorship. This also includes an investment owned by the official's spouse or

dependent child or an investment held in trust for the official. (§82034; Cal. Code Regs., tit.2, §18234).

2. Interest in real property

An investment of $2,000 or more in real property located in, or within two miles of, the jurisdiction of the official's agency. The official is also financially interested in decisions affecting property within a 500-foot radius of the official's property. (Cal. Code Regs., tit.2, §18704.2). Thus, he or she is precluded from making any official decisions affecting any property within 500 feet of that in which he or she has a financial interest.

The official also has a financial interest in any investment owned by his spouse or dependent child or an investment held in trust for the official. (§82033; Cal. Code Regs., tit.2, §18234). This applies to governmental decisions that will result in new or substantially improved public services such as water, sewer or streets. (Cal. Code Regs., tit.2, §18704.2(a)(6)).

3. Income

Any source of income totaling $500 or more promised to, or received by, the official within 12 months prior to the time the decision is made. This would include the official's community property interest in his spouse's income ($1,000) but does not include any interest in a dependent child's income. This does not include gifts, campaign contributions or loans made in the normal course of business.

4. Business entity

Any economic interest in a business entity (as defined in G.C. §82005) in which the official is an officer, director, employee or holds any business interest, even if the official receives no income from the entity.

5. Gifts

According to Government Code §87103(e), a public official or employee has a financial interest in any source of gifts totaling $390 or more received within 12 months prior to the time the decision is made. Government Code §89503 prohibits candidates and elected public officials from receiving any gift totaling $390 or more from a single source. As a result, non-elected public officials and public employees are considered to have a financial interest, for purposes of §87100, in gifts aggregating $390 or more from a single source. On the other hand, it is a misdemeanor for candidates and elected officials to accept gifts aggregating $390 from a single source.

6. Personal finances

An official has a financial interest in his or her personal finances or the finances of his or her immediate family. This includes any increase or decrease in personal expenses, income, assets or liabilities but does not include the effects on the official's real property or investment interests. It also does not include the official's government salary, per diem or benefits.

E. Rule of necessity

When analyzing a possible §87100 violation, keep in mind that Government Code §87101 provides a defense in situations in which the public official's participation in the decision is legally required (rule of necessity). This defense may arise in situations wherein an interested member must participate in the decision making process in order to establish a quorum.

F. Statute of limitation

Pursuant to Government Code §91000, the statute of limitations for any violation of the P.R.A., including §87100, is four years from the date of the violation.

G. Statement of Economic Interest

Government Code sections 87200 et. seq. require candidates and elected and appointed officials to file statements, which are public records, disclosing their investment interests, interests in real property and sources of income. Candidates must file the statement, referred to as a "Form 700 Statement of Economic Interest," no later than the last day to file for office. Upon taking office, newly elected officials must file a Form 700 providing the required information and must thereafter file annual statements. A statement is also required upon leaving office. The filed statements must include all interests and income for the previous 12 months.

Those required to file such statements are: elected state officers, judges and commissioners, members of the Public Utilities Commission, members of the State Energy Resources Conservation and Development Commission, members of the Fair Political Practices Commission, members of the California Coastal Commission, members of planning commissions, members of the board of supervisors, district attorneys, county counsels, county treasurers, and chief administrative officers of counties, mayors, city managers, city attorneys, city treasurers, chief administrative officers and members of city councils of cities, and other

public officials who manage public investments, and candidates for any of these offices at any election.

Sources of income that are required to be disclosed include gifts in excess of $50 and the proceeds of any loan (G.C. §87207). A gift in excess of $50, but less than $390, would have to be reported but would not prohibit the official from making an official decision affecting the source of the gift. A gift to a non-elected official or employee in excess of $390 would prohibit that official or employee from taking official action on any issue affecting the source of the gift. A gift in excess of $390 to an elected official is strictly prohibited.

III. Government Code §1090

Unlike §87100, which applies to all governmental decisions, Government Code §1090 applies only to contracts, sales and purchases in which a public official or employee has a financial interest. Section 1090 is not part of the Political Reform Act and is not subject to enforcement by, or advice from, the FPPC. Violations of §1090 can be pursued both civilly and criminally. Any contract in which a public official has a financial interest in violation of §1090 is void ab initio. (G.C. §1092; *Marin Healthcare Dist. v. Sutter* (2002) 103 Cal.App.4th 861).

Section §1090 states: "Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity."

It should be noted that the conduct prohibited in §1090 is not the vote or other action taken on the contract but rather the financial interest in the contract. Therefore, a contract entered into by the agency, even if the interested member abstains, is in violation of §1090 and void. If a public official has a prohibited interest in a contract that is coming before the board upon which he sits, the official must resign from public office or eliminate the financial interest in order to prevent a violation of §1090.

A. Criminal intent requirement

Not all violations of G.C. §1090 are criminal. Pursuant to G.C. §1097, only those persons subject to §1090 who willfully violate any of its provisions can be prosecuted criminally. To constitute a willful violation the official must "purposefully make a contract in which he is financially interested." (*People v. Honig* (1996) 48 Cal. App. 4th 289). The *Honig* court further ruled, "'Knowingly' means the official must know that there is a reasonable

likelihood that the contract may result in a personal financial benefit to him."

The criminal penalty, as stated in G.C. §1097, is a fine of not more than $ 1,000, or imprisonment in the state prison, and a lifetime disqualification from holding any office in the state.

B. Officers and employees

All public officers and employees are subject to 1090. Case law has held that employees, officers, attorneys, agents, brokers, landlords, tenants and vendors of contracting parties have had sufficient financial interests in contracts to be held liable under §1090. A public employee also has a financial interest in the income of his or her spouse. (*Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655). Cases have held that independent contractors, such as city attorneys, are also subject to §1090. (*People v. Gnass* (2002) 101 Cal.App.4th 4621).

Regarding consultants to public agencies, the California Attorney General has issued an opinion that consultants exercising judgment on behalf of public entities are subject to the statute (46 Ops.Cal.Atty.Gen. 74 (1965)). In *Old Town Development Corp. v. The Urban Renewal Agency of the City of Monterey* (249 Cal.App.2d 313), Faustman, who worked for a local developer, was appointed to sit on an advisory panel to assist the agency in selecting a developer for a project. The advisory panel recommended the developer for whom Faustman worked. The court held that the contract was valid because Faustman did not make any decision in his "official capacity" since he merely made a recommendation and was not involved in adopting the resolution hiring the developer.

In the 2010 case of *Hub City Solid Waste Services v. City of Compton* (186 CA4th 1114), the court determined that the city's consultant on solid waste issues was subject to prohibitions of section 1090. The court held that "a person in an advisory position to a city may fall within the scope of section 1090. In particular, independent contractors whose official capacities carry the potential to exert considerable influence over the contracting decisions of a public agency may not have personal interests in that agency's contracts."

The test, as described by the court in *Hub City*, is "the extent to which the person influences an agency's contracting decisions or otherwise acts in a capacity that demands the public trust."

C. Contract defined

As to §1090, the courts have ruled that the term "contract" be liberally construed. In *People v. Sobel* (1974) 40 Cal.App.3d 1046, at 1057, the

court held: "The decisional law, therefore, has not interpreted section 1090 in a hypertechnical manner, but holds that an official (or public employee) may be convicted of violation no matter whether he actually participated personally in the execution of the questioned contract, if it is established that he had the opportunity to, and did, influence execution directly or indirectly to promote his personal interests."

In *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, at 237, the court held that in referring to the making of a contract "the word 'made' is not used in the statute in its narrower and technical contract sense but is used in the broad sense to encompass such embodiments in the making of a contract as preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids."

1. Specific types of contracts

- An employment contract between the agency and one of its board members is prohibited by G.C. 1090. (*Finnegan v. Schrader* (2001) 91 Cal.App.4th 572).

- A lease agreement is a contract prohibited by section 1090 (*People v. Darby* (1952) 114 Cal.App.2d 412).

- Negotiating the rental value of a lease already in place is also a contract under G.C. 1090 (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191).

D. Financial interest

Whereas the Political Reform Act specifically lists the financial interests prohibited by G.C. §87100, the financial interests prohibited by §1090 are not so narrowly defined. Financial interest was defined in *People v. Watson* (1971) 15 Cal.App.3d 28, as "...any financial interest which might interfere with a city officer's unqualified devotion to his public duty. The interest may be direct or indirect and includes any monetary or proprietary benefits, or gain of any sort, or the contingent possibility of monetary or proprietary benefits." As stated in *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, "The phrase 'financially interested' broadly encompasses anything that would tie a public official's fortunes to the existence of a public contract...To construe the statue narrowly would permit certain categories of schemes and improprieties to go unchecked, a result which would undermine the public's confidence not only in the government, but in the court system ruling on such cases. An important, prophylactic statute such as section 1090 should be construed broadly to close loopholes; it should not be constricted and enfeebled."

There is some excellent language in *People v. Wong*[1] (186 Cal.App.4th 1433, 1451) illustrating the broad view the courts have taken when connecting the official to the benefit received: "Labels and titles and fictional divides that create illusory separation between a public official, a clandestine benefactor and a source of income or other benefit must be ignored. Instead, we must "'look behind the veil which enshrouds [the] activities [of public officials and their clandestine benefactors] in order to discern the vital facts. However devious and winding the trail may be which connects the officer with the forbidden contract, if it can be followed and the connection made, a conflict of interest is established.'"

The certainty of a financial gain need not be so established. "The object of the enactments is to remove or limit the possibility of any personal influence, either directly or indirectly which might bear on an official's decision..." (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569).

Contributions to the political campaigns of elected public officials do not create a financial interest prohibited by 1090. There must be some financial or pecuniary benefit which would inure to the benefit of the officer/employee due to official action or inaction. (*Breakzone Billiards v. City of Torrance*, 81 Cal.App.4th 1205 (2000)).

A city attorney who contracts out city work to a litigation firm in exchange for a percentage of any proceeds has a financial interest in the contract and is in violation of 1090. (*Campagna v. City of Sanger*, 42 CalApp.4th 533 (1996)).

An official cannot make or influence an official decision regarding a business or party with whom he has a debtor-creditor relationship. (*People v. Watson*).

In *People v. Deysher* (2 Cal.2d 141 (1934)), county supervisor Deysher owned a company that rented heavy equipment. Deysher approved a contract for road construction to a company that rented equipment from his company. The court held, "However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void. In determining whether or not a contract such as this is against public policy and illegal, the court is not concerned with the technical relationships of the parties, but will look beyond the veil which enshrouds the matter to discern the vital facts."

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[1] Leland Wong, a Los Angeles City Commissioner, was prosecuted by the Public Integrity Division.

A city attorney cannot purchase land from the city (*Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278) nor can the director of a public utility district purchase bonds from the district (*Salada Beach Public Utility District v. M.O. Anderson* (1942) 50 Cal.App.2d 306) without violating 1090.

In *People v. Sobel* (40 Cal.App.3d 1046), a deputy purchasing agent for the County of Los Angeles purchased several hundred thousand dollars' worth of books from a company in which his wife had a controlling interest. In affirming the defendant's criminal conviction for violating 1090, the court held, "the defendant had the opportunity, whatever his job classification, to direct steady flow of Los Angeles County business and money to a concern in which he was interested, personally, and that he did so. His activities in this regard constituted the type of conduct the Legislature desired to discourage."

E. Remote interests

Government Code §1091 contains a list of "remote" financial interests. If the public official has one of these remote interests in the contract and the official discloses the interest on the record and the official abstains from any vote, he cannot be civilly or criminally prosecuted for violating §1090. A willful failure to disclose the interest subjects the officer to criminal prosecution.

If a remote interest exists, and the board authorizes the contract in good faith, then the contract is valid and enforceable. The remote interests listed in §1091 only apply to members of multi-member boards and not to individual employees. If an employee of the agency has a remote interest in the contract, he or she would still be in violation of 1090 regardless of whether or not the conflict was disclosed to the board.

A public officer with a remote interest who attempts to influence another member of the agency to enter into the contract would still be criminally liable.

The remote interests listed in G.C. §1091 are as follows:

a) An officer of a non-profit (501(c)(3))entity;

b) An employee/agent of the contracting party if:

   1) The public officer has been an employee/agent with the company for at least three years prior to taking office;

   2) The company has 10 or more other employees;

3) The public officer owns less than 3 percent of the stock in the company and is not an officer or director of the company;

4) The public officer did not directly participate in formulating the bid submitted by the company.

c) An employee/agent of the contracting party if:

1) The public agency is in a county with a population of less than 4 million;

2) The contract is not for personal services;

3) The contract is competitively bid;

4) The public officer is not a director, officer or primary manager of the company and holds no ownership interest;

5) The company has 10 or more other employees;

6) The public officer did not directly participate in formulating the bid submitted by the company;

7) The contracting party is the lowest responsible bidder.

d) A parent in the earnings of his or her minor child for personal services.

e) A landlord or tenant of the contracting party.

f) An attorney, stockbroker, insurance agent/broker, real estate agent/broker if:

1) They will not receive remuneration, consideration or commission as a result of the contract;

2) They have an ownership in the law firm or agency of 10 percent or more.

g) A member of a non-profit corporation formed for the sole purpose of merchandising agricultural products of supplying water.

h) A supplier of goods and services to the public agency if the contracting party has been supplying those goods and services for at least five years prior to the officer's appointment to the public agency.

i) Any contract entered into pursuant to the California Land Conservation Act of 1965.

j) A director or person having an ownership interest of 10 percent or more in a bank/savings & loan with which the contracting party has a relationship as borrower, depositor, debtor or creditor.

k) An engineer, geologist or architect employed by a firm who does not serve as a director, officer or primary manager of the firm.

l) A party to a Section 8 housing assistance payment contract that was in existence prior to the officer being appointed to the public agency.

m) A person receiving salary, per diem, or reimbursement for expenses from a government entity which is a contracting party.

n) A person owning less than 3 percent of the shares of the contracting party received as a result of his or her employment.

F. Non-interests

Government Code §1091.5 contains a list of interests which, for public policy reasons, have been deemed to be "non-interests." Interests listed in §1091.5 do not create a conflict pursuant to §1090. An officer with a non-interest can fully participate in any votes, discussions or decisions without criminal liability.

The non-interests are:

a) An ownership interest of less than 3 percent in a contracting corporation in which total dividend income received does not exceed 5 percent of the public officer's total annual income.

b) Reimbursement for actual and necessary expenses incurred in the performance of official duties.

c) A recipient of public services generally provided by the public agency of which he or she is a member.

d) A landlord or tenant of the contracting party if the contracting party is a public agency.

e) A tenant in a public housing authority in which he or she serves as a member of the authority or of a community redevelopment commission.

f) The employment of a spouse of an officer or employee of the public agency if the spouse's employment existed at least one year prior to the officer's election or appointment.

g) A non-salaried member of a nonprofit corporation as long as the interest is disclosed and noted in the agency's official record.

h) A non-compensated officer of a nonprofit whose primary purpose is to support the functions of the agency as long as the interest is noted in the official record.

i) A person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee.

j) An attorney, broker or agent of the contracting party, if he will not receive a fee or commission and has an ownership interest of less than 10 percent in the company/agency.

k) Officer, employee or person with less than a 10 percent ownership of a bank with which a party to the contract is a depositor, borrower, debtor or creditor.

l) A nonprofit corporation having as its primary purpose the preservation or restoration of a park, natural lands or historical resources for public benefit.

m) An officer, employee or board member of the California Housing Finance Agency as to his interest in a loan discussed or approved by him if:

   1) The loan may be originated by any lender approved by the agency, and

   2) The loan is generally available to qualifying borrowers on similar terms and conditions.

n) An officer, director or employee of a bank with which a contracting party is a borrower, depositor, debtor or creditor, where the contract is competitively bid.

G. Aiding/abetting liability - See 1090 (b)

In *D'Amato v. Superior Court of Orange County*, (2009) 167 CA4th 861, an appellate court ruled that members of a legislative body who vote on a contract which results in a financial benefit to another member or

employee, cannot be criminally prosecuted for violating G.C. 1090, liable under an aiding/abetting theory. The court held that the board members have legislative immunity from criminal prosecution because the legislative intent in enacting section 1090 was to limit the scope of liability to those with a financial interest in the contract.

H. Rule of necessity

There is also a "rule of necessity defense" in §1090 cases. "The 'rule of necessity' allows public officials to take actions they would otherwise be disqualified from taking by operation of conflict of interest rules if their disqualification would make it impossible for the public agency to fulfill one of its vital public duties...If the board has a legal duty to enter into a particular contract in which one of its members has a financial interest, the rule of necessity may come into play." (*Finnegan v. Schrader* (2001) 91 Cal. App. 4th 572). Contracts which are entered into by the agency which are not vital, necessary or mandated, would not fall within this exception.

The defense applies in several situations, such as when a board contracts for essential services that are not available from any source other than the one in which a board member has an interest. (4 Ops.Cal.Atty.Gen. 264). It also applies to permit a public official to carry out the essential duties of his office despite a conflict of interest where he is the only one who may legally act. (69 Ops.Cal.Atty.Gen. 102).

When analyzing a necessity defense, determine whether the specific contract in question is one which the board was required to make. In the *Finnegan* case, a sanitary district contracted with one of its board members to become the district manager. The board member accepted the position prior to resigning from the board and was subsequently sued for a 1090 violation. He claimed the rule of necessity but the appellate court ruled that although the board was required to contract with someone for the district manager position, they were not required to offer the job to the defendant.

I. Penalties/remedies

Contracts in violation of G.C. 1090 are void, not merely voidable. (G.C. §1092; *Marin Healthcare Dist. v. Sutter* (2002) 103 Cal.App.4th 861; *Thomson v. Call* (1985) 38 Cal.3d 633). The public agency is allowed to retain the benefit of the contract and the contracting party must forfeit the proceeds received from the agency. (*Thomson v. Call*; *Berka v. Woodward* (1899) 125 Cal. 119; *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572; *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th). "It is settled law that where a contract is made in violation of section 1090, the public entity involved is entitled to recover any

compensation that it has paid under the contract without restoring any of the benefits it has received." (*Finnegan*, supra 91 Cal.App.4th at page 560). There is no quantum meruit recovery available. As stated in *Carson Redevelopment Agency*, requiring disgorgement of any contract benefits received "is the most effective way to give section 1090 all the teeth that it needs."

J. Statute of limitations

Pursuant to Penal Code sections 801.5 and 803(c)(4), a prosecution for a 1090 violation must be filed within four years of the date that the financial interest is discovered. For a more thorough discussion on P.C. §803, see the manual section covering Misuse of Public Funds.

Chapter 4

BRIBERY AND EXTORTION

I. Introduction

In terms of public integrity prosecution, bribery and extortion under color of authority are somewhat related in that each crime involves a payment to a public official in exchange for the official taking, or refraining from taking, some official action. The difference being, in a bribery case the payment is made to the official voluntarily and in the extortion case the payment is made to the official as a result of a threat or demand.

II. Bribery

A. Generally

California Penal Code §7 defines the word "bribe" as: "anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a *corrupt intent* to influence, unlawfully, the person to whom it is given, in his or her action, vote, or opinion, in any public or official capacity."

1. Elements of a bribe

"Thus, as far as the bribe-taker is concerned, the crime of bribery consists of three elements: (1) the person charged must be a member of one of the bodies specified..., (2) that person must ask for, receive, or agree to receive something of 'value or advantage,' present or prospective; and (3) the request, receipt or agreement to receive must be upon an understanding that his opinion, judgment or action upon any official matter on which he may be required to act will be influenced." (*People v. Diedrich*, 31 Cal. 3d 263, 272)

2. Meaning of "corrupt intent"

CALCRIM 2600 instructs jurors that "A person acts with *corrupt intent* when he or she acts to wrongfully gain a financial or other advantage for himself, herself, or someone else."

3. No specific/pending action required

There is no requirement that the bribe being given or received be earmarked for any specific action pending before the public official. In fact, there need not be any action pending at the time the bribe is

received. The statutes prohibit payment which could influence the consideration of any matter upon which the public official *may* conceivable be required to act in his official capacity. (*People v. Diedrich* (1982) 31 Cal. 3d. 263).

4. "Official act" not required

It is not necessary that the act that the briber intends to influence with his bribe is an "official act" within the lawful duties of the officer. "It is sufficient to charge and prove that the subject matter upon which the bribe was to operate existed and could be brought before the public officer in his official capacity. The fact the duty is not specifically conferred upon the officer by statute is immaterial." (*People v. Megladdery* (1940) 40 Cal. App. 2d 748).

5. Campaign contributions

Campaign contributions, if given and/or received with the requisite corrupt intent to influence, can constitute bribes. (*People v. Wolden*, 255 Cal.App.2d 798) The fact that the contributor illegally laundered campaign contributions in violation of campaign contribution limits would certainly be evidence of a corrupt intent to influence.

B. Bribery statutes

There are a number of statutes contained in the Penal Code relating to bribery. Some target the person offering the bribe, but most target the official or employee accepting or soliciting the bribe. The appropriate statute to charge in a criminal complaint depends upon whether the target/defendant is the one offering the bribe or the one to whom the bribe is being offered. Another factor to be considered is the official position of the person soliciting accepting, or being offered, the bribe.

1. Penal Code §67

Section 67 prohibits any person from giving or offering a bribe to an executive officer in this state with intent to influence any act, vote, opinion or other proceeding. A violation of this section is a felony punishable by two, three or four years in state prison and disqualification from holding any office in the state.

a) The case of *People v. Hallner* (43 Cal. 2d 715) concluded that the person being bribed did not have to be a "state" officer so long as he or she was an executive officer within the State of California.

b) Section 67 (as well as section 68 below) requires the specific intent to corruptly influence an official duty. CALCRIM defines that intent as acting "to wrongfully gain a financial or other advantage."

c) "The words 'executive officer' in the statute refer to an officer of the executive branch...and not to a municipal officer having executive duties." (*People v. Mathews* (1954) 124 Cal.App.2d 67).

   1) "Generally, whether the duties entrusted to a public officer are 'executive' or 'ministerial' in character turns on whether the duties to be performed are discretionary or imperative. In the former, the public servant is an 'executive officer'; in the latter, a 'ministerial officer.'" (*People v. Strohl* (1976) 57 Cal.App.3d 347, 361).

   2) "Where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial, but where the act to be done involves the exercise of discretion and judgment it is not to be deemed merely ministerial." (*Elder* v. *Anderson* (1962) 205 Cal.App.2d 326, 331).

d) CALCRIM 2600 defines an executive official as one "who may use his or her own discretion in performing his or her job duties."

e) CALJIC 7.00 defines an executive officer as: "a public employee whose lawful activities are in the exercise of a part of the sovereign power of the governmental entity employer, and whose duties are discretionary, in whole or in part. Any employee charged with the responsibility of enforcing the law is an executive officer."

f) Cases have determined the following to be executive officers for purposes of PC 67:

   - A district attorney (*Singh v. Superior Court* (1919) 44 Cal.App. 64);
   - Sheriffs and their deputies (*People v. Lips* (1922) 59 Cal.App. 381);
   - Chiefs of police (*People v. Finkelstin* (1950) 98 Cal.App.2d 545);
   - Police officers (*People v. Mathews*);
   - President of the board of police commissioners, city attorney and the executive assistant city attorney (*People v. Hallner,* 43 Cal. 2d 715);
   - City marshall (*People* v. *Anderson* 75 Cal.App. 365);
   - Constable (*Manss* v. *Superior Court* (1914) 25 Cal.App. 533);
   - Chief deputy coroner (*People v. Strohl,* 57 Cal. App. 3d 347).

g) This statute targets the person offering the bribe, not the official receiving the bribe. Penal Code §68 (below) is the appropriate statute to use for prosecuting an executive officer (or any public employee) who solicits or receives a bribe.

1) Case law holds that an executive officer who receives a bribe is not an accomplice to a defendant prosecuted under P.C. §67 for giving the bribe and the officer's testimony, therefore, does not need to be corroborated. (*People v. Wolden* (1967) 255 Cal.App.2d 798).

2) Corroboration is not required because the officer cannot be liable for the identical offense (P.C. §67) as the giver of the bribe. The officer, if he or she accepted the bribe, would be guilty of P.C. §68, a different offense, requiring different motives and purposes.

3) Neither are the two parties co-conspirators because they do not have a shared intent. As to some of the statutes listed below, such as P.C. 165, where the briber and the recipient can be prosecuted under the same statute, corroboration may be required.

h) In *People v. Biane* (2013) 58 Cal. 4th 381, the offeror of the bribes is not precluded as a matter of law from complicity in the offense of aiding and abetting in accepting a bribe, thus allowing the offeror to be charged as an aider and abettor in accepting the bribe as well as a co-conspirator in the receipt of the bribe.

1) Though not overruling *People v. Worden*, the Supreme Court explained that it depended on whether the offeror's conduct went beyond that of merely offering or paying the bribe to then *also* satisfy the elements aiding and abetting the receipt of the bribe.

2) In reversing the Appellate and Trial Courts Order of the demurrers, the Court held:

"Whether the offeror is guilty of aiding and abetting the receipt of the bribe depends on whether there is evidence that, in addition to the offer or payment of the bribe, the offeror with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime. Similarly, being the offeror or payor of a bribe does not

disqualify that person, as a matter of law, from culpability for participating in a conspiracy to accept that same bribe."

3) The Court stated that the lower court's reasoning erroneously attempted to use a converse logic of Wolden. Instead, they explained, though the giver and receiver *may* have different intents, it is not required, as a matter of law, that they *must* have different intents.

4) The Court also indicated that the recipient of the bribe could be charged as well as an aider and abettor or co-conspirator of offering the bribe. Lastly, it is important to note this was a unanimous decision of the California Supreme Court.

Caveat: The *Biane* court was merely ruling on a demurrer and made it very clear they were not deciding the sufficiency of the evidence to support the pleading only the sufficiency of the pleading.

i) Since the statute prohibits the offering, as well as the giving of a bribe, the crime is complete upon the offer of a bribe with the requisite intent to influence an act. No money need be presented or transferred. (*People v. Ah Fook* (1881) 62 Cal. 493).

Additionally, there is no requirement that the executive officer agree, or intend, to accept the bribe. (*People v. Brigham* (1945) 72 Cal.App.2d 1).

j) PC 67 is punishable in state prison as one of the excluded offenses for PC 1170(h)(1).

2. Penal Code §67.5

As stated above, section 67 only applies if the person to whom the bribe is offered is an executive officer. If the person to whom the bribe is offered is a ministerial officer, then the appropriate statute to use to charge the person offering the bribe is Penal Code §67.5.

a) CALCRIM defines a ministerial officer in 2601 as "an officer who has a clear and mandatory duty involving the performance of specific tasks without the exercise of discretion."

b) CALJIC 7.01 defines a ministerial officer as: "a public employee whose duties are mandatory in the sense that the employee's duties involve a set of tasks to be performed without the exercise of discretion."

c) A violation of section 67.5 is a misdemeanor or a felony, depending upon the amount of the bribe offered. If the amount would constitute petty theft, the defendant is guilty of a misdemeanor. If the amount would constitute grand theft, the defendant is guilty of a felony. A violation is punishable in local state prison pursuant to PC 1170(h)(1).

3. Penal Code §68

Penal Code section 68 prohibits every executive or ministerial officer, employee, or appointee of the State of California, a county or city therein, or a political subdivision thereof, from asking for, receiving, or agreeing to receive a bribe, upon any agreement or understanding that his or her vote, opinion, or action upon any matter then pending, or that may be brought before him or her in his or her official capacity, shall be influenced thereby.

a) A violation of P.C. 68 is complete upon the official asking for the bribe. There is no requirement that the bribe actually be received by the official. (*People v. Brigham*, 72 Cal.App.2d 1)

b) Additionally, there is no requirement that the official and the person offering the bribe reach any agreement on the payment of a bribe. "It is not necessary that there be an understanding, in the sense of an agreement, with the person unlawfully approached but merely an understanding on the part of the bribe seeker himself that his official action shall be influenced." (*People v. Vollman*, 73 Cal.App.2d 769, 788)

c) It is not necessary to allege that the act the briber sought to influence was among the official duties of the public officer or employee. "It is sufficient to charge and prove that the subject matter upon which the bribe was to operate existed and could be brought before the public officer in his official capacity. The fact the duty is not specifically conferred upon the officer by statute is immaterial." (*People v. Megladdery* (1940) 40 Cal. App. 2d 748,782)

d) As with a violation of P.C. 67, the person of whom the bribe is requested is not an accomplice to a P.C. 68 violation and his testimony would not have to be corroborated. (*People v. Wolden*). The offeror can be an aider and abettor in the receiving of the bribe, see *People v Biane* discussed above.

e) In some instances, the official receiving a bribe will also have a conflict of interest as defined in G.C. 1090, such as where the bribe is received in exchange for influencing a contract. In such a case,

both P.C. 68 and G.C. 1090 are proper subjects for joinder pursuant to P.C. 954. (*People v. Watson*, 15 Cal.App.3d 28).

f) As one of the excluded offenses for PC 1170(h)(1), PC 68 is punishable by imprisonment in state prison for two, three, or four years; and, in cases in which no bribe has been actually received, by a restitution fine of not less than $2,000 or not more than $10,000. Additionally, the officer forfeits his office and is forever disqualified from holding any office, employment, or appointment in the state.

4. Penal Code §70

Penal Code §70 prohibits any ministerial officer, employee or appointee of the state, county, city or any political subdivision, from knowingly asking for, receiving or agreeing to receive any emolument, gratuity or reward, or the promise thereof, except when authorized by law, for doing an official act.

A violation of section 70 is a misdemeanor. There is an exception in subsection 70(c) for peace officers who work part-time as private security guards.

a) The difference between an emolument, gratuity or reward as described in section 70 and a bribe is the corrupt intent element. Section 70 can be violated without the employee having a corrupt intent.

b) The conduct prohibited in section 70 is the asking for or receiving the reward for doing an official act.

c) Penal Code section 70 includes several subsections which exclude peace officers who work as off-duty security officers from prosecution under this statute. A violation is a felony punishable in local state prison pursuant to PC 1170(h)(1).

5. Penal Code §73

Penal Code §73 prohibits any person from giving or offering a gratuity or reward in exchange for being appointed to a public office. A violation is a misdemeanor.

6. Penal Code §74

Section 74 prohibits a public officer from accepting a gratuity or reward for appointing another person to a public office. If convicted, the officer is subject to a $10,000 fine, forfeits his/her office and is forever disqualified from holding any office in the state.

A violation is a felony punishable in local state prison pursuant to PC 1170(h)(1).

7. Penal Code §85

a) This section prohibits any person from offering or giving a bribe to a member of any legislative body of a city, county, school district or other special district to influence a member in giving or withholding his vote or not attending a meeting.

b) It also prohibits attempting by menace, deceit, suppression of truth, or any corrupt means to influence a legislative member in giving or withholding his vote or not attending a meeting. A violation is a felony.

c) *Note:* Section 85 only applies to influencing a vote or attending a meeting, it does not prohibit offering a bribe to influence any other type of official action. If the official action that the briber intends to influence is other than a vote a different statute must be used as the basis for the charge.

d) PC 85 is punishable in state prison as one of the excluded offenses for PC 1170(h)(1).

8. Penal Code §86

a) Penal Code §86 prohibits a member of any legislative body from asking for or receiving a bribe upon the understanding that the bribe will influence his or her official vote, opinion or action.

b) This section also prohibits any legislative member from "trading" votes with another member of the same body. In other words, it is a violation of section 86 for one member of the body to agree to vote in a particular manner in exchange for a promise from another member to vote in a particular manner.

c) Section 86 applies to state legislative members, city council members, boards of supervisors, school board members and members of special districts, including water boards.

d) Unlike section 85, this section is not limited to influencing votes or attendance at meetings but includes the influencing of official opinions or actions.

e) A violation constitutes a felony punishable by state prison and a restitution fine of up to $10,000 depending upon the amount of the

bribe. PC 86 is punishable in state prison as one of the excluded offenses for PC 1170(h)(1).

9. Penal Code §92

Giving or offering a bribe to a judicial officer or juror with intent to influence a decision is a felony in violation of P.C. 92.

a) "Linkage between a payment and a specific official decision is not required under Cal. Penal Code §§ 92 and 93. Cal. Penal Code §§ 92 and 93 make unlawful bribes intended to influence any matter which is or may be brought before a judge for decision." (*United States v. Frega*, 179 F.3d 793, 805)

b) An intermediary, who conveys to a juror a third party's offer of a bribe, is guilty of P.C. 92. (*People v. Northey*, 77 Cal. 618).

c) PC 92 is punishable in state prison as one of the excluded offenses for PC 1170(h)(1).

10. Penal Code §93

A judicial officer, juror, referee or any other person authorized to hear a controversy who asks for or receives a bribe in exchange for influencing his or her decision is guilty of a felony in violation of Penal Code section 93.

PC 93 is punishable in state prison as one of the excluded offenses for PC 1170(h)(1).

11. Penal Code §94

Penal Code section 94 prohibits a judicial officer from asking for, or receiving, any emolument or gratuity for performing an official act. A violation of section 94 constitutes a misdemeanor.

Since the statute does not mention bribery, no corrupt intent is required for a conviction. A violation is a felony punishable in local state prison pursuant to PC 1170(h)(1).

Section 94 also prohibits court reporters appointed by judges to pay a portion of their fee to the judge.

12. Penal Code §165

Section 165 applies to the members of city councils, common councils, boards of supervisors and boards of trustees of any county, city or public corporation.

a) Any member of those bodies who receives or offers to receive a bribe upon an understanding that his/her official vote, opinion, judgment or action shall be influenced, is guilty of a felony and forever disqualified from public office.

b) Any person who offers or gives a bribe to any member of those bodies with the intent to corruptly influence a member is also guilty of a felony.

   1) The case of People v. Coffey, 161 Cal. 433, held that a board member, charged with P.C. 165, who conveyed a bribe offer from a third party to his fellow board members was an accomplice whose testimony had to be corroborated.

   2) See discussion above in *People v. Biane* under PC §86 regarding charging as aider and abettor and co-conspirator.

c) PC 165 is punishable in state prison as one of the excluded offenses for PC 1170(h)(1).

13. Education Code §35230

Offering something of value to any school board member with the intent to influence his/her action in the granting of a teacher's certificate, appointing any officer or employee, adopting a textbook or making a contract constitutes a misdemeanor. The acceptance of any such bribe by a school board member also constitutes a violation of section 35230. This section only applies to school board members.

14. Elections Code §18205

Section 18205 prohibits the payment of money or other valuable consideration to someone in order to induce them to withdraw as a candidate for public office, or to agree not to become a candidate. A violation is a felony punishable in local state prison pursuant to PC 1170(h)(1).

15. Elections Code §18520/18521

Pursuant to section 18520 it is a felony to promise any office or employment to a voter in order to induce the voter to refrain from

voting, or to vote for or against a particular candidate. Section 18520 applies to the person attempting to influence the voter. Section 18521 applies to the voter and prohibits a voter from receiving or agreeing to receive employment, appointment to office or anything of value in exchange for refraining from voting or for voting for or against any particular candidate. A violation is a felony punishable in local state prison pursuant to PC 1170(h)(1).

16. Elections Code §18522

Section 18522 prohibits a person or controlled committee from paying, lending or contributing anything of value to a voter in exchange for the voter refraining from voting or voting for or against a particular candidate. A violation is a felony punishable in local state prison pursuant to PC 1170(h)(1).

17. Elections Code §18523

Section 18523 applies to those who provide money to be used in bribery at an election. Anyone who pays, or causes to be paid, money or anything of value, for the use of another person to be used in bribery at an election is guilty of a felony. A violation is punishable in local state prison pursuant to PC 1170(h)(1).

18. Elections Code §18311

Section 18311 is applicable only to political conventions or some other political gathering in which candidates are nominated. It prohibits bribes to, or accepted by, members of the committees or convention for the purpose of influencing the selection of candidates. A violation is a felony punishable in local state prison pursuant to PC 1170(h)(1).

III. Extortion

As defined in Penal Code §518, extortion can be committed in two ways:

1) Obtaining property from another, with his consent, through the wrongful use of force or fear, or under the color of official right; or

2) Obtaining an official act of a public officer through the wrongful use of or force or fear.

Most commonly, in extortion cases the property will be obtained through the use of fear since obtaining property by force could be prosecuted as robbery if the property is within the victim's immediate presence.

A. Property

a) The term "property" includes real and personal property, including money, goods, chattels, things in action and evidence of debts. (Penal Code §7)

b) Civil Code section 654 states: "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property."

c) Property, for purposes of extortion, includes the right to file an administrative protest with a licensing board. (*People v. Baker*, 88 Cal.App.3d 115)

d) Additionally, courts have held that information can constitute "property." For example, an unlisted phone number, social security number and insurance policy number (*Dreiman v. State*, 825 P.2d 758) or a PIN to a bank account (*People v. Kozlowski*, 96 Cal. App. 4th 853)

B. Threats

Penal Code section 519 specifically describes the types of threats that can satisfy the element of fear required for an extortion prosecution. Those include threats:

1) To do an unlawful injury to the person or property of the individual threatened or of a third person; or,

2) To accuse the individual threatened, or any relative of his, or member of his family, of any crime; or,

3) To expose, or to impute to him or them any deformity, disgrace or crime; or,

4) To expose, any secret affecting him or them.

a) The threats sufficient for extortion do not have to be in any particular form and can be made by innuendo. (*People v. Massengale*, 261 Cal. App. 2d 758)

b) The relationship between the parties and the circumstances under which the threat is made can be considered. (*People v. Oppenheimer*, 209 Cal. App. 2d 413)

c) It should be noted that the threat of a "lawful" injury cannot form the basis of an extortion prosecution. (*People v. Schmitz*, 7 Cal. App. 330)

d) In addition to threats of physical injury or damage to property (*People v. Peppercorn*, 34 Cal.App.2d 603) a threat to unlawfully imprison or arrest is also sufficient to satisfy the element of a threat of unlawful injury. (*People v. Sanders*, 188 Cal. 744; *People v. Fanquelin*, 109 Cal.App.2d 777)

e) Obtaining property upon the threat to accuse the victim of a crime is extortion even if the criminal allegations are true. The defendant cannot punish the victim by extracting property from him in lieu of calling the police. (*People v. Beggs*, 178 Cal. 79)

   1) Even if the defendant has already reported the crime to the police, a threat to continue to pursue criminal charges can form the basis of a threat sufficient to constitute extortion. (*People v. Umana*, 138 Cal. App. 4th 625)

f) Threatening to expose a prior criminal conviction is sufficient to constitute extortion. (*People v. Cadman*, 57 Cal. 562)

g) To constitute a threat to expose a secret, the secret must be unknown to the general public and affect the person's reputation or other interest so as to induce them through fear to give up the property. (*People v. Lavine*, 115 Cal. App. 289)

h) To constitute extortion, the wrongful use of fear must be the operating cause for the victim to consent to give up the property. If some cause other than fear was the primary and controlling reason, then the defendant cannot be convicted of extortion. (*People v. Turner*, 22 Cal.2d 186)

i) Sending a threatening letter or other writing with intent to extort property violates a specific criminal statute: Penal Code section 523.

   1) The writing does not have to expressly state a threat, it is sufficient if the language used implies a threat. (*People v. Oppenheimer*, 209 Cal.App.2d 413)

   2) Since the gravamen of the offense is sending a letter with intent to extort, it is the intent of the defendant, rather than the effect on the recipient, that is at issue. (*People v. Fox*, 157 Cal.App.2d 426)

C. Transfer of property

An extortion prosecution requires that the victim actually transfers property to the defendant. If no property is transferred or obtained, there is no extortion.

a) There is a specific Penal Code section for attempted extortion: P.C. 524.. Section 524 should be considered in cases in which the defendant does not actually obtain property from the victim.

1) As in other cases involving an attempt to commit a crime the defendant's actions must go beyond mere preparation and rise to the level of unequivocal action towards commission of the crime. (*People v. Camodeca*, 52 Cal. 2d 142)

2) It must be established that the defendant's intent was to immediately obtain the property, rather than obtaining the property only in the event of a possible future occurrence. (*People v. Sales*, 116 Cal. App. 4th 741).

For example, where the defendant has taken all the necessary steps to commit extortion except receive the property. (*People v. Franquelin*, 109 Cal. App. 2d 777)

b) Although Penal Code sections 523 and sections 524 refer only to money or other property, the statutes can also be violated by obtaining, or attempting to obtain, an official act of a public officer. (*Isaac v. Superior Court*, 79 Cal.App.3d 260)

IV. Collateral Consequences Of Conviction

A. Elections Code §20

Added in 2012 and effective January 1, 2013, Elections Code §20 prohibits the consideration of a person as a candidate for, and would provide that the person is not eligible to be elected to, any state or local elective office if the person has been convicted of a felony involving accepting or giving, or offering to give, any bribe, the embezzlement of public money, extortion or theft of public money, perjury, or conspiracy to commit any of those crimes.

Included is a conviction of a felony in this state and a conviction under the laws of any other state, the United States, or any foreign government or country of a crime that, if committed in this state, would be a felony, and for which the person has not received a pardon from the Governor of this state, the governor or other officer authorized to grant pardons in another state, the President of the United States, or the officer of the foreign

government or country authorized to grant pardons in that foreign jurisdiction.

B. Government Code § 1021.5.
Conviction of specified crimes; Disqualification from public employment for specified times

Also added in 2012 and effective January 1, 2013, a public employee convicted of any felony involving accepting or giving, or offering to give, any **bribe**, the embezzlement of public money, extortion or theft of public money, perjury, or conspiracy to commit any of those crimes arising directly out of his or her official duties as a public employee, shall be disqualified for five years from any public employment, including, but not limited to, employment with a city, county, district, or any other public agency of the state. The five-year disqualification begins at the date of conviction or release from incarceration, whichever comes later.

For purposes of this section, "public employee" means any person employed at will for the purposes of providing services to an elected public officer who takes public office, or is reelected to public office, on or after January 1, 2013.

Chapter 5

BROWN ACT

I. Division Priority/Policy In Enforcing Brown Act

The Public Integrity Division is responsible for enforcing the Brown Act in Los Angeles County. Our ultimate goal is full compliance by all agencies within our jurisdiction that are subject to the provisions of the Act. In order to obtain full compliance, and restore the citizen's confidence in government, it is imperative that we respond to all complaints and, in cases in which a violation has occurred, seek an appropriate remedy in a timely fashion. An appropriate remedy, as will be discussed below, can range from a letter suggesting procedural changes to a misdemeanor criminal filing. Although a criminal filing may be warranted in some egregious situations, our primary goal is always compliance.

For several reasons, time is of the essence in Brown Act investigations. First, there are statutory time limitations imposed as to some of the available remedies which require prompt decisions and actions by the moving party. Secondly, a failure to act swiftly tends to embolden the offending agency and frustrate the complainant, leaving both with the perception shared by many prior to the inception of PID, that Brown Act violations are not treated seriously. Also, as with any investigation, memories and enthusiasm fade with time.

The Brown Act is contained in Government Code sections 54950 – 54963. Helpful references include: *The Brown Act, Open Meetings for Local Legislative Bodies* (2003) California Attorney General's Office and *Open & Public IV: A Guide to the Ralph M. Brown Act,* 2nd Edition, Revised July 2010, League of California Cities.

II. Review Process

A. Initial evaluation

1. Notice of no violation found

Upon initial receipt of a complaint of a potential Brown Act violation, the first determination should be whether the facts alleged in the complaint, if true, would constitute a violation. If the complainant's statement of facts would not constitute a violation of the Act, a letter shall be written to the complainant including the following:

a) The complainant's recitation of the facts as understood by the reviewing deputy;

b) A brief statement of the applicable Brown Act sections;

c) A brief analysis explaining why the facts, as stated, do not constitute a violation of the law.

2. Request for additional information

If the facts alleged by the complainant are inconclusive or unclear, a letter shall be written to the complainant requesting additional facts or clarification. The complainant shall be notified in the letter of any applicable time limitations and shall be given a specific date by which to respond. They shall be notified that failure to respond in a timely manner will result in the case being closed.

The handling deputy shall follow up to determine whether the complainant responded within the time limit and close the case in the event the complainant failed to respond. In cases where time constraints would make a letter to the complainant impractical, the handling deputy should contact the complainant directly to obtain the required information.

3. Notice of investigation and no violation found

Where the facts as alleged by the complainant would, if true, constitute a Brown Act violation, the handling deputy shall obtain the evidence required to establish the truth of the facts alleged. At the conclusion of the investigation and review of the evidence, if it is the handling deputy's opinion that a violation did not occur, a letter, as discussed above (II.A.1.), shall be sent to the complainant explaining the decision not to pursue a violation.

If, after a review of the evidence, the deputy is of the opinion that a violation occurred, the deputy shall make a recommendation to the Head Deputy as to which remedy is the most appropriate.

B. Document review

The first step in any review of a possible Brown Act violation is the collection and review of the relevant documents. These would include: agendas, minutes and any documents reviewed, discussed or voted on by the agency members. Pursuant to Government Code section 54957.5, agendas and any documents distributed during a meeting of the agency are public records. Many city council meetings are audio or video taped. A review of the relevant tapes should also be done as an initial step.

Documentary evidence, such as agendas, minutes, tapes and/or transcripts are public records that can be obtained directly by the handling deputy. Minutes of closed sessions are not public records but may be subpoenaed to court if a closed session violation is alleged to have occurred (G.C. § 54957.2).

When handling an allegation of an agenda violation, a review of the agenda and the minutes and/or tape recording may be all that is required to make a determination whether a violation occurred.

C. Dialogue with agency

In situations where the agency is represented by counsel who may have advised the agency at the time of the violation, the handling deputy may wish to contact the agency's attorney. Often a dialogue with the agency's attorney can streamline the review process. The attorney can provide the required documents, provide the agency's version of the facts and explain the reasoning behind the agency's actions and any exception to the Brown Act upon which they were relying. All contact with the agency should be in writing and those writings shall be considered to be public documents.

D. Investigation

If additional investigation is required after all relevant documents have been obtained and reviewed, an investigator should be assigned to interview any witnesses. These may include the complainant, members of the audience, agency members or employees of the agency.

If the complaint alleges that an agency is improperly posting the agenda, an investigator should be assigned to physically view the posting location. Photographs should be taken to document an improperly posted agenda.

III. Available Remedies

A. Government Code § 54960.1 – Cure and correct

1. Policy and procedure

As our primary goal is compliance, our initial inquiry should include an evaluation of the effectiveness of attempting voluntary compliance through the "cure and correct" procedures contained in § 54960.1. Section 54960.1 should be our primary remedy and be utilized whenever appropriate.

Section 54960.1 allows for an action by mandamus or injunction to have a judge declare as null and void an action taken by an agency in violation of the Brown Act.

Prior to filing suit, the demanding party must make a demand of the offending agency to cure and correct the violation. The demand must be made within 90 days from the date the action was taken, unless the violation was an agenda violation pursuant to § 54954.2, in which case the demand must be made within 30 days. The agency has 30 days within which to respond to the demand. If no response is made, or if the agency makes written notification of its decision not to cure or correct, the demanding party has 15 days within which to commence a lawsuit or be barred.

Although the "cure and correct" remedy should be our primary tool to enforce compliance, it should only be used where action by the agency is taken and is capable of subsequent correction. Procedural violations not resulting in action are probably better dealt with by a letter bringing the violation to the attention of the agency or in accordance with the provisions of § 54960 (see III.B. below). Examples of situations in which the "cure and correct" remedy pursuant to § 54960.1 would be appropriate include:

a) Decisions made or actions taken by a majority of agency members during an illegal closed session;

b) Actions taken on non-agenda items;

c) Votes taken by secret ballot.

2. Agency notification and demand for cure

If the recommendation by the handling deputy is to "cure and correct," a letter to the agency shall be prepared. The letter should contain the following:

a) A brief description of the complaint received (without revealing the identity of the complainant);

b) A summary of the facts as we have determined them to be and supported by the evidence reviewed;

c) An explanation of why we believe a Brown Act violation has occurred, including reference to specific Government Code citations;

d) A "cure and correct" demand stating specifically what remedial action we are requesting of the agency;

e) The time frame within which the agency must comply or otherwise respond;

f) The consequences of non-compliance.

3. Complainant notification

A blind copy of the letter shall be sent to the complainant.

4. Agency response

The handling deputy shall be responsible for monitoring the actions of the agency in response to the cure and correct letter. We are only interested in full compliance with our demand. It is the policy of this division that we will not negotiate or compromise. If full compliance does not occur, a lawsuit will be filed within the statutory time.

B. Government Code § 54960 – Preventing future violations

1. Policy and procedure

Government Code § 54960 provides for the commencement of an action by mandamus, injunction or declaratory relief for the purpose of determining whether the agency is in violation of the Act, preventing future violations by the agency and/or requiring the agency to tape record future closed sessions. This option is appropriate in situations where no illegal action was taken but there are ongoing procedural violations of the Brown Act. As obtaining relief pursuant to § 54960 requires initiating and litigating a civil lawsuit, this option should only be utilized in situations where the agency refuses to acknowledge the violation or refuses to conform future conduct to the requirements of the Act.

Prior to opting for this remedy, attempts should be made to obtain voluntary compliance. This should be done by way of a letter to the agency and their legal counsel explaining the nature of the complaint, our legal reasons for concluding that a violation has occurred or is occurring, and what steps should be taken by the agency to correct the violation. The letter should notify the agency that this office will continue to monitor future meetings to determine whether the agency complies with the Act. If compliance is not attained, a second letter should be sent notifying the agency of our intent to file a civil lawsuit, followed by the initiation of legal proceedings.

Although we will always be willing to engage in a dialogue with the offending agency or their counsel regarding a difference of opinion on the interpretation of the Brown Act, full compliance is our goal and we will not negotiate a compromise that does not conform to the requirements of the Act.

2. Typical violations

Examples of situations in which Section 54960 would be appropriate include:

a) Agenda preparation and posting violations (54954.1; 54954.2);

b) Imposing conditions on the public to attend meetings (54953.3);

c) Restricting the public's right to testify at meetings (54954.3).

3. Voluntary compliance

If the recommendation by the handling deputy is to proceed by way of preventative relief pursuant to Government Code § 54960, the agency shall be given the option of voluntarily complying with the Act, prior to the initiation of the request for injunctive relief. In order to give the agency the opportunity to voluntarily comply, a letter shall be written containing the following:

a) A brief description of the complaint received (without revealing the identity of the complainant);

b) A summary of the facts as we have determined them to be and supported by the evidence reviewed;

c) An explanation of why we believe a Brown Act violation has occurred, including reference to specific Government Code citations;

d) A demand stating specifically what action the agency must take to conform their behavior to the mandates of the Brown Act;

e) A statement notifying the agency that failure to correct their procedures could subject them to civil action.

4. Complainant notification

A blind copy of the letter shall be sent to the complainant.

5. Agency response

The handling deputy shall be responsible for monitoring the actions of the agency in response to the demand letter. We are only interested in full compliance with our demand. It is the policy of this division that we will not negotiate or compromise. If full compliance does not occur, a lawsuit will be filed within the statutory time. If appropriate, the handling deputy should also consider a demand pursuant to Government Code § 54960 that the agency tape record future closed sessions.

C. Government Code § 54959 - Criminal penalty

1. Policy and procedure

Government Code § 54959 allows for the filing of a misdemeanor against any agency member who attends a meeting where action is taken in violation of the Brown Act, when the member intends to deprive the public of information to which the member knows, or has reason to know, the public is entitled.

The filing of a misdemeanor should only be used as a last resort. A criminal Brown Act violation should only be filed in situations where the agency members clearly acted with the requisite specific intent or where the agency members have continued to criminally violate the Act after written notice from this office. If the recommendation is for a criminal prosecution, a Filing Memorandum shall be prepared pursuant to the Public Integrity Division Operations Manual (section 4(D)).

Although § 54959 subjects only members of the agency to misdemeanor prosecution, under Penal Code § 31, aiders and abettors would also be liable. Non-agency members who conspire with agency members to violate the Brown Act would also be liable for felony prosecution under Penal Code § 182.

Wharton's Rule would probably prohibit filing a conspiracy if the only persons involved in the conspiracy were agency members. "Where the cooperation of two or more persons is necessary to the commission of the substantive crime, and there is no ingredient of an alleged conspiracy that is not present in the substantive crime, then the persons necessarily involved cannot be charged with conspiracy to commit the substantive offense and also with the substantive crime itself .... This is the 'concert of action rule' or Wharton's Rule." (*People v. Keyes* (1930) 103 Cal.App. 624, 646.

IV. Disclosure of Information

If contacted by the media or members of the public regarding the existence or status of a Brown Act complaint, the handling deputy shall provide only the following information:

a) Confirmation that a complaint has been received;

b) The identity of the agency against whom the complaint was made;

c) Whether the matter is open or closed;

d) Whether a letter was sent to the agency;

e) Whether a civil or criminal complaint has been filed.

If a letter has been sent by the handling deputy to the agency regarding any findings or conclusions resulting from the complaint, a copy of that letter is a public record pursuant to the Public Records Act and shall be made available to the media or a member of the public upon request. In cases in which no letter has been sent, neither the specific nature of the complaint nor the underlying facts shall be disclosed to the media or public.

V. Confidentiality of the Complainant

Consistent with the law regarding non-percipient witnesses, and in an effort to encourage vigilance, the identity of the complainant shall not be disclosed to the media, public or the agency. This policy allows those who wish to report perceived violations to do so without compromising their privacy. Any request for disclosure of the identity of the complainant shall be evaluated pursuant to the Legal Policies Manual and applicable statutory authorities.

APPENDIX A

Brown Act Basics

A. Who is subject?

"Legislative bodies" are governing bodies of a local agency, like city councils, county boards, school boards, district boards, and committees formed by local agencies (that part's more complicated) G.C. 54952

B. What is governed?

The **process** by which meetings are conducted.

1. What is a meeting?

A meeting occurs when a majority of the members congregate at the same place and time to consider matter within their subject matter jurisdiction. G.C. 54952.2

2. Member communications

Members can communicate to all members individually, for instance, they can send an email to all fellow members about their position, or if they have a question, but they cannot establish a discussion involving a majority of the members.

3. No "serial meetings"

Serial meetings, also know as "daisy chain meetings", are *not* permitted. Members cannot communicate among themselves (or through intermediaries) and "link" the one-on-one meetings by communicating the position of a member who is not part of that communication, and essentially involve a majority of the members.

4. Meeting materials

Anything that is distributed to all or a majority of members of a legislative body must be made available for the public to review.

5. Meeting conditions

Cannot create conditions to attendance for meetings. G.C. 54953.3

6. Recordings

Anyone can record a meeting so long as it's not disruptive. G.C. 54953.5

7. Exceptions

Purely social events.

8. Not governed

Minutes of meetings, Robert's Rules of Order, bylaws, quality of decisions.

C. General requirements

1. Open meetings

All meetings are open and public unless a specific closed session exception (which is narrowly construed) applies. G.C. 54953

2. Must post an agenda

All matters to be considered must be noticed.
An agenda must be posted **72 hours before a regular meeting, or 24 hours before a special meeting,** at a location that is publicly accessible 24/7 (like a bulletin board). G.C. 54954.2

3. Description of agenda items

An agenda must include a **"brief general description** of the matter to be considered...sufficient to put a reasonable person on notice for further inquiry."

4. Agenda items

Only agendized items can be considered at the meeting. G.C. 54954.2

Exception: emergency matter that was not known or could not reasonably have been known prior to the posting of the agenda, and 2/3 of the agency makes a finding of the need to consider it.

5. Public comment

Must provide an opportunity for public comment. G.C. 54954.3

a) Two types:

1) Before or during consideration of any matter before the agency

2) Anything within the subject matter jurisdiction of the legislative body.

b) Can regulate time, place and manner of public comment

c) Can limit time to a couple minutes, and can require speaker cards

d) Cannot regulate content of speech unless disruptive or rude.

D. Closed sessions

a) Only as explicitly permitted in the following circumstances:

1) **Pending or Anticipated Litigation** (Attorney/Client)

2) **Personnel Matters** including performance evaluation of persons that work for the Board (Privacy), Labor Negotiations

3) **Real Property**: sale, lease, purchase or exchange only (advise negotiator of price and terms)

4) **Security Threat** (Bomb, threat to essential services, terrorism

b) *Not permitted*: internal discussions, UNLESS within a permissible closed session category.

c) Cannot adopt contracts/set salaries in closed session; must be done in open session.

d) Information received in closed session is confidential so long as information is within permissible closed session exception.

e) Unauthorized disclosure of closed session information is not actionable by us. Remedies are listed, and can be sought by legislative body itself.

E. Timing

Generally, a demand to cure and correct must be issued within 90 days of the violation. The legislative body has 30 days to respond. If they don't cure and correct, we can then sue them in civil court for declaratory and injunctive relief.

If we don't think it's a matter that we would file a civil action about, then the "knock it off" letter can go out later than 90 days.

F. Analysis

1) Is the agency/target a legislative body?

2) What conduct is involved?

3) Is the conduct governed by the Brown Act?

4) Has the claimed violation occurred in the past 90 days?

APPENDIX B

Brown Act Procedure

What really happens? A written complaint is received alleging some violation of the Brown Act.

The identity of the Complainant is confidential (Ev. Code 1040 Official Info). Who tells us may be interesting, but not relevant to determining whether the conduct occurred and if so, whether it violated the Brown Act.

1. **Step One: Assessment**

   a) Review Complaint to see if it is, in fact, a Brown Act matter. Assign it an internal case number for tracking purposes.

      (as opposed to Robert's Rules or By Law violation or...)

      1) If it appears to be something other than a Brown Act matter, then a letter outlining our analysis establishing why it is NOT a Brown Act matter will be sent to the complainant.

      2) If it appears to state sufficient facts that, if true, constitute a violation of the Brown Act, then we will go to step two.

2. **Step Two: Gather materials (usually written or recorded)**

   a) Gather additional materials (agendas, minutes, recordings)

      1) Sometimes online (no contact required)

      2) Sometimes via verbal request

      3) Most often via written request

   b) Where facts require additional "on site" investigation, we will send an investigator if:

      1) Tape/recording doesn't depict some aspect of the meeting

      2) Issues exist regarding conditions at meeting

      3) Need to interview participants

c) Contact agency under review only if we need additional info or clarification. Why don't you contact the agency and give us a chance to explain in every case?

1) Intent is not an issue in nearly all cases.

2) Conduct is what is being reviewed.

Generally, we do NOT vet our analysis with the agency before final decision. It is not a matter of "professional courtesy" but a matter of scrupulous adherence to objectivity.

3. Step Three: Conduct analysis and reach a conclusion

a) Rule of strict construction prevails:

When strict construction does not yield an answer, we ask "how is the public's interest served by this conduct?"

b) Adherence to scrupulous objectivity and fairness:

We have no interest in the outcome of the agenda item or matter involved.

4. Step four: Issue written response setting forth our analysis

a) To agency when violation is found. In some cases, we will reach preliminary findings and invite input from the agency.

b) To complainant in every case.

Timing: Where violations found, we will typically allow transmission time so the agency has an opportunity to review our findings before the complainant can find a media source to publicize their "victory".

Written conclusions and findings are always issued: Why? Because we must be responsive to the public's complaints. Also, it is essential to encouraging public confidence in governmental agencies.

Content: Analysis is presented whether violations are found or not. Why? Because accurate information regarding what the rules are and are not is a valuable tool in seeking compliance by the agencies and in assisting the public to participate in the decision-making process in a permissible and reasonable way.

Caveat: Letters/findings have no real precedential value because every case is evaluated on its own facts, and details from one situation may not match completely on others.

Ultimate goal is compliance with the letter and the spirit of the Brown Act to encourage public confidence in the decision making process.

APPENDIX C

Sample Templates

A. Misdemeanor complaint form

Government Code section 54959

Each member of a legislative body who attends a meeting of that legislative body where action is taken in violation of any provision of this chapter, and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled under this chapter, is guilty of a misdemeanor

Government Code section 54959 Pleading

On _____, in the County of Los Angeles, the crime of DEPRIVING THE PUBLIC OF INFORMATION, in violation of GOVERNMENT CODE SECTION 54959, a misdemeanor, was committed by _____, who, while a member of a legislative body, did willfully attend a meeting of that legislative body where action was taken in violation of Section _____ of the Government Code, with the specific intent to deprive the public of information to which the defendant knew or had reason to know the public was entitled.

B. Proposed jury instruction

Government Code section 54959 jury instruction

[Defendant is accused [in Count[s] _____] of having committed the crime of depriving the public of information in violation of section 54959 of the Government Code, a misdemeanor.]

Every person who, while a member of a legislative body, willfully attends a meeting of that legislative body where action is taken in violation of any provision of Government Code sections 54950 through 54962, also known as the *Brown Act*, with the specific intent to deprive the public of information to which that person knew or had reason to know the public was entitled, is guilty of a violation of Government Code section 54959, a misdemeanor.

In order to prove this crime, each of the following elements must be proved:

1) A person was a member of a legislative body

2) That person willfully attended a meeting of that legislative body

3) At that meeting, action was taken in violation of any provision of Government Code sections 54950 through 54962

4) That person specifically intended to deprive the public of information and knew or had reason to know that the public was entitled to the information sought to be withheld.

As used in this instruction "legislative body" includes [a local governing body] [a local commission, committee, board, or other body created by charter, ordinance, resolution or formal action of a legislative body] [a multimember body that governs a private corporation or entity that [is created by the elected legislative body to exercise lawfully delegated authority] [receives local public funds and has as a full voting member, a member of the local legislative body] [is a lessee of a hospital first leased pursuant to Health & Safety Code section 32121(p) after January 1, 1994, where the lessee exercises material authority delegated to it by the local legislative body]]. [A non-standing, advisory committee composed solely of the members of the legislative body which are less than a quorum is not a "legislative body".]

As used in this instruction "meeting" means any congregation of a majority of the legislative body to hear, discuss, or deliberate upon any matter within their subject matter jurisdiction [and includes any means employed by a majority of the legislative body to develop a collective concurrence as to action to be taken by the legislative body].

As used in this instruction "action taken" means a collective decision made by a majority of the legislative body [and includes an actual vote by the legislative body upon a motion, proposal, resolution, order or ordinance] [and includes a collective commitment or promise by the legislative body to make a positive or negative decision].

The public is entitled to be provided with all information regarding all discussions, deliberations and actions by the legislative body [unless the legislative body is specifically authorized by statute to meet in a closed session. Whether the legislative body was specifically authorized to take the action in question during a closed session, is a matter for your determination].

*If a defendant asserts that the legislative body was entitled to discuss, deliberate and take the action in question during a closed session, then an instruction that this would be a defense and defining the particular exception asserted would be necessary.

LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE
BUREAU OF FRAUD AND CORRUPTION PROSECUTIONS
PUBLIC INTEGRITY DIVISION

JACKIE LACEY • District Attorney
SHARON J. MATSUMOTO • Chief Deputy District Attorney
JOSEPH P. ESPOSITO • Assistant District Attorney

SCOTT K. GOODWIN • Director

APPENDIX D

May 20, 2013

The Honorable Members of the Board of Education
El Rancho Unified School District
9333 Loch Lomond Drive
Pico Rivera, CA 90660

Re: Allegation of Brown Act Violation
PID Case 13-0246

Dear Members of the Board,

We received a complaint alleging that the Board of Education for the El Rancho Unified School District violated the Brown Act by meeting in closed session on December 20, 2012 regarding agenda item "8.1 Authority to Contract for Services and Advice (Pursuant to Government Code §53060) – Construction Management Firm Presentations." We obtained pertinent agendas and minutes of Board meetings from your website and appreciate your efforts to make those materials readily available to the public. Based on our review of these materials and the applicable law, it appears that the Board did violate the Brown Act by conferring in closed session on a subject matter not exempted by the Act.

The Brown Act requires, with limited exceptions, that all meetings of a legislative body of a local agency be open and public. (Government Code sections 54950-54952). A school board, such as that for the El Rancho Unified School District, constitutes a legislative body and is subject to the Act. (GC§§ 54951-54952.) The Act permits only specific exceptions to the general rule of open and public meetings. These exceptions include:

- License/permit determinations (GC§ 54956.7)
- Conference with real property negotiators (GC§ 54956.8)
- Conference with legal counsel for existing or anticipated litigation (GC§ 54956.9)
- Liability claims (GC§ 54956.95)
- Threat to public services or facilities (GC§ 54957)
- Certain public employee issues (GC§ 54957)
- Conference with labor negotiators (GC§ 54957.6)

766 Hall of Records
320 West Temple Street
Los Angeles, CA 90012
(213) 974-6501
Fax: (213) 620-9648

In the agenda and minutes for the December 20, 2012 meeting, item 8.1 cites GC§ 53060 as justification for holding a closed session. That section authorizes a legislative body to contract with other persons to perform special services. However, it does not authorize doing so in closed session. Thus, meeting in closed session for this purpose was in violation of the Brown Act.

The minutes for that meeting report in section 10 that during closed session the Board took action to contract with the Del Terra Group for construction management services subject to a final contract agreement. With certain limitations under the Brown Act, improper actions taken in closed session can be the subject of a legal suit and rendered null and void by a judge. However, based on the minutes of subsequent meetings posted on your website, it is our understanding that a final contract agreement has not yet been reached. Thus, it would be prudent for the Board to reconsider the contract with the Del Terra Group in open session of a public meeting and to ensure that any subsequent considerations on the matter also be done in compliance with the Act.

Furthermore, minutes of an improper closed session are not confidential but are to be public record. (*Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 907-908.) Thus, any minutes or recordings of the closed session at issue here should be made available to the public.

We appreciate you addressing this issue promptly and hope that bringing it to your attention will help guide your continuing efforts to comply with the Brown Act.

Very truly yours,
JACKIE LACEY
District Attorney

By
BJORN E. DODD
Deputy District Attorney
Public Integrity Division

LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE
BUREAU OF FRAUD AND CORRUPTION PROSECUTIONS
PUBLIC INTEGRITY DIVISION

JACKIE LACEY • District Attorney
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JOSEPH P. ESPOSITO • Assistant District Attorney

SCOTT K. GOODWIN • Director

APPENDIX E

May 21, 2013

CHRISTINA PADILLA
15202 Leffingwell Rd.
La Mirada, CA 90638

Re: El Rancho Unified School Board
Case Number P13-0246

Dear Ms. Padilla,

We have completed our review of your complaint of a violation of the Brown Act by the Board of Education for the El Rancho Unified School District. Enclosed is a copy of our letter sent to the Board explaining our conclusion that there was indeed a violation of the Act by the Board meeting in closed session on December 20, 2012. As outlined in the letter, it is our understanding that the contract with the Del Terra Group is not yet final. However, even if it has been finalized, any efforts to remedy an action taken improperly in closed session must be initiated within 90 days of the violation. We received your letter of complaint after 90 days and thus would have no standing to take any formal legal action. As stated in our letter to the Board, we recommend that they reconsider the matter in open session of a public meeting. Furthermore, any minutes or recording of the improper closed session should be made public. At this point, we will not take any further action regarding the Brown Act violation.

Additionally, you raised concerns of conflicts of interest by Alfred Renteria, Member of the Board of Education, and Gustavo Camacho, Pico Rivera City Councilman and consultant with the Del Terra Group. You insinuate that Mr. Renteria's support for hiring the Del Terra Group conflicts with his responsibility to guard the best interests of the school district. As you accurately pointed out, there were significant issues with the terms of the contract as initially drafted. However, those issues were timely identified and the Board appears to be addressing them. In any case, the authority of the District Attorney is limited in scope and does not include reviewing an official's competence or motivations unless they violate a law. The question of what amounts to a conflict of interest is much more limited under the law than in common understanding. In this situation, there is no indication that Mr. Renteria is breaking any law.

Likewise, there is no basis to infer that Mr. Camacho is breaking the law. While potentially raising ethical concerns, using his position on a city council to attract business for the Del

Terra Group does not mean he is breaking a law. It might well be against the law for him to vote as a public official to give business to the Del Terra Group because of his connection. However, in this situation he is not in position to vote on the matter.

Thank you for your concerns for the El Rancho Unified School District and for bringing them to our attention. If you have any questions, feel free to contact me you at (213) 974-6508 or bjdodd@da.lacounty.gov.

Very truly yours,

JACKIE LACEY
District Attorney

By

BJORN DODD
Deputy District Attorney

Chapter 6

RESIDENCY ISSUES

I. Residency Requirements

Certain public offices require the office holder to reside within the district served. These include city council members, city clerk, city treasurer, school board members and water board members.

California Government Code § 36502(a) reads: "A person is not eligible to hold office as councilmember, city clerk, or city treasurer unless he or she is at the time of assuming the office an elector of the city, and was a registered voter of the city at the time nomination papers are issued to the candidate as provided for in Section 10227 of the Elections Code. If, during his or her term of office, he or she moves his or her place of residence outside of the city limits or ceases to be an elector of the city, his or her office shall immediately become vacant."

Therefore, in order to be eligible to hold office as an elected city official, there are two requirements:

(1) the candidate must be a registered voter of the city at the time the nomination papers are issued; and

(2) the officer-elect must be an elector of the city at the time of assuming office (in other words he or she must be a United States citizen, 18 years or older, and a resident of an election precinct at least 29 days prior to an election).

California Education Code § 35107 requires school board members to be 18 years of age or older, a citizen of the state, a resident of the school district and a registered voter.

California Water Code § 71501 requires each director of a water board to be a resident of the division he or she represents.

A. Quo warranto

Although residency within the political district is required by the statutes mentioned, the statutes are not criminal and a failure to comply cannot be prosecuted criminally.

An elected official who did not reside within the district at the time of election, or who moved out of the district during his or her term of office,

vacates that office. Remaining in office subjects the office holder to a civil action in *quo warranto* removing him or her from the illegally held position.

a) The procedures for prosecuting a *quo warranto* action are found in California Code of Civil Procedure §§ 803-811 (actions for usurpation of an office). Additional *quo warranto* procedural information is found in the California Code of Regulations, Title 11.

b) Actions in *quo warranto* are brought by the Attorney General's Office on its own or upon the complaint of a private party. *Quo warranto* actions brought by private parties or district attorney's offices cannot proceed without the permission and oversight of the Attorney General's Office.

   The Attorney General is less likely to give permission to bring an action in *quo warranto* in situations where the proposed target of the action is near the end of his or her term in office, as the issue will likely be moot prior to resolution.

c) California Code of Civil Procedure § 809 states: "When a defendant, against whom such action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding any office, franchise, or privilege, judgment must be rendered that such defendant be excluded from the office, franchise, or privilege, and that he pay the costs of the action."

Thus, the result of a successful *quo warranto* action is the removal of the offending official from office. *Quo warranto* actions are more commonly brought in "incompatible office" type cases than in residency disputes.

B. Criminal Violations

Although violations of the residency requirements for holding specific offices are not criminal, non-resident candidates commit other crimes in order to run for the office.

1. False candidacy papers

Candidates for most public offices are required to file some type of document with the city clerk when they declare their candidacy. These documents usually (but not always) require the candidate to state their residence. However, they should require the candidate to declare that he or she meets all qualifications for the office, including residency

Knowingly filing a false candidacy paper violates Elections Code § 18203, which is a criminal statute. Section 18203 is a wobbler.

a) Section 18203 is a general intent crime in contrast to perjury which requires a specific intent.

b) The defense might argue that it is a specific intent crime based on *People v. Guevara* (2004) 121 Cal.App.4th 17. Addressing a question of statute of limitations for section 18203, the court in *Guevara* held that the period was four years instead of three under Penal Code § 803(c) because the statute was designed to protect against fraud. However, the court did not discuss or rule regarding general versus specific intent or on the elements of proof for the statute.

c) While there is no case law directly on point that section 18203 is a general intent crime, case law establishes that many statues with the same operative language are general intent crimes. (See *People v. Calban* (1976) 65 Cal.App.3d 578 [knowingly filing petition with false signatures in violation of Cal. Elec. Code §§ 29216, 29217, and 29218 involved crimes of general intent].)

2. Perjury

Charges of perjury in residency cases usually involve statements made on voter registration affidavits and candidacy declaration forms.

The voter registration affidavit requires one to write his or her residence address. Candidacy declaration forms sometimes request the residence address, but primarily, the form requires a candidate to declare that he or she meets all of the qualifications for the particular office, including residency. Perjury is a felony punishable in state prison.

Residency requirements for holding office in a particular district derive from the requirement that a candidate be eligible to vote in that district. California Elections Code § 2000 lists the requirements for voting in public elections held within the state and allows qualified voters to vote in any election held within the territory within which the voter resides.

a) To vote in an election, each voter must be registered to vote. Registration is accomplished by filling out an affidavit of registration described in California Elections Code § 2150. In addition to other personal information, the voter must state on the affidavit their place of residence.

   Just so there is no confusion, there is a place for the voter to include his or her mailing address, if different from his or her residence

address. The voter certifies under penalty of perjury that the content of the affidavit is true and correct.

1) Elections Code § 2116 states that a person "shall execute" a new affidavit of registration when they change their residence address.

2) However, Elections Code § 2119 allows a person changing his or her address within the same county to submit a signed letter in lieu of an affidavit to make the change of address. Such a letter would not be under penalty of perjury and could be used to avoid liability for perjury.

b) The candidacy declaration forms filed with the city clerk may require the candidate to sign under penalty of perjury. Additionally, the city clerk may place the candidate under oath and have them state that the information contained in the document is true and correct. In such situations, the prosecutor should consider prosecution pursuant to Penal Code § 118, perjury.

c) In order to be consistent in his or her false claim of residency, the candidate may also sign other documents under penalty of perjury providing the false address, including voter registration forms, DMV documents, school records for school aged children or home loan documents in which the candidate states that the home will be his/her primary residency.

d) The most common issue arising in a perjury prosecution is the materiality of the false statement. To violate P.C. § 118, the declarant must willfully state as true a "material matter" that he or she knows to be false.

e) In a perjury prosecution arising out of a residency matter, the domicile of the defendant should always be material. However, the issue of materiality is one for the jury to decide. (*People v. Kobrin* (1995) 11 Cal.4th 416.)

f) Related to perjury, "information is material if it is probable that the information would influence the outcome of the proceedings...." (CalCrim 2640.)

However, when the perjury is based on an omission or misstatement on a candidate disclosure document, the test is whether a "reasonable person would consider it important in evaluating (1) whether a candidate should be elected to, or retained in, public office, or (2) whether a public official can perform the duties of office free from any bias caused by concern for the

financial interests of the official or the official's supporters." (*People v. Hedgecock* (1990) 51 Cal.3d 395, 407-407.)

g) The current (2014) voter registration form issued by the secretary of state calls for the "Home address." On past versions of the form, the prompt has read "Residence," or "ADDRESS, Where you live." A defendant might contest materiality based on the wording of such prompts.

For example, when the affidavit in question read, "ADDRESS, Where you live," the defense has argued that any misstatement on the affidavit would not be material because legal registration depends upon one's domicile which may differ from where a person "lives."

Thus, regardless of what the form states, we must prove domicile, not where a person "lives."

h) In some residency cases, the candidate will ask others to sign documents under penalty of perjury to bolster his or her false claim of residency. In those situations consider California Penal Code § 127, subornation of perjury.

C. Voter fraud

a) Elections Code § 18100, a wobbler, prohibits the registration of a voter who is not qualified. If the candidate actually votes in the election, they are subject to Elections Code § 18560, also a wobbler, which prohibits casting a fraudulent ballot.

b) If the candidate is an incumbent who commits voter fraud he/she can be prosecuted for a violation of Elections Code § 18501, a felony, which prohibits a public official from knowingly allowing fraud in connection with a vote. Section 18501 carries a lifetime bar on holding office in California.

c) Since the affidavit of registration is signed under penalty of perjury, consider P.C. § 118 charges as well. If residency within the voting precinct is a requirement for registration, then voter's residence is demonstrably material.

d) A potential loop-hole to avoid liability for voter fraud exists in the procedures for provisional ballots under Elections Code section 14310.

1) Subsection (a) allows one to vote a provisional ballot if their proper registration and qualifications cannot be immediately

established. When a voter casts a provisional ballot, he or she must sign it under penalty of perjury declaring that they meet all qualifications.

2) Then, § 14310 (c)(3) declares, "The provisional ballot of a voter who is otherwise entitled to vote shall not be rejected because a voter did not cast his or her ballot in the precinct to which he or she was assigned by the election official."

3) Continuing in paragraph (c)(3)(A), "If the ballot cast by the voter contains the same candidates and measures on which the voter would have been entitled to vote in his or her assigned precinct, the elections official shall count the votes for the entire ballot."

4) Paragraph (B) then provides, "If the ballot cast by the voter contains candidates or measures on which the voter would not have been entitled to vote in his or her assigned precinct, the elections official shall count only the votes for the candidates and measures on which the voter was entitled to vote in his or her assigned precinct."

This section seeks to ensure that every legitimate vote is counted. Therefore, it provides the Secretary of State directives under different contingencies But it should not be considered a defense to perjury or voter fraud. However, it might still be relevant to proving specific intent.

II. Residence v. Domicile

A. Statutes

The Government Code sections requiring school board and water board members to reside within the districts they represent do not define the term "residence." Government Code § 36502, pertaining to city officials, requires the city official to be a registered voter of the city. For purposes of voting, the Elections Code contains several statutes defining residence.

1. What is a domicile

Elections Code § 349 defines residence, for voting purposes, to mean a person's domicile. A person's domicile is defined as "that place in which his or her habitation is fixed, wherein the person has the intention of remaining, and to which, whenever he or she is absent, the person has the intention of returning. At a given time, a person may have only one domicile."

all other persons." (*People v. Mayer* (2003) 108 Cal.App.4th 403, 414.) (See attached sample motion to exclude such expert testimony.)

C. Unique considerations relating to legislators

1. Conclusive presumption of domicile

Elections Code § 2026 provides a unique presumption for legislators. It states:

The domicile of a Member of the Legislature or a Representative in the Congress of the United States shall be conclusively presumed to be at the residence address indicated on that person's currently filed affidavit of registration.

a) This unique presumption was "designed to apply to '[l]egislators who, of necessity, spend a great amount of time away from their *true* domicile, often going so far as to purchase homes and move their families to the location of their Legislature in service of their constituents ...." (*People v. Wright* (2011) 197 Cal.App.4th 511, 516 quoting Assembly Speaker Willie Brown, letter to Governor George Deukmejian, Mar. 1, 1984, italics added.)

   Accordingly, a candidate could attempt to claim domicile at a sham residence just until elected to the legislature and then abandon it physically while maintaining the address on his or her voter registration.

b) However, this presumption is not absolute. The *Wright* court explained, "What is conclusively presumed is not the legislator's 'residence' but rather his or her 'domicile.' We hold this conclusive presumption applies only if the address indicated on the legislator's currently filed affidavit of voter registration is one of the legislator's legal residences." (*Id.* at p. 516.)

2. Jurisdiction

The California Constitution contains two provisions relevant to residency for legislators.

a) Article IV, section 2, subdivision (c) provides that "[a] person is ineligible to be a member of the Legislature unless the person is an elector and has been a resident of the legislative district for one year ... immediately preceding the election."

However, this time requirement of one year has been declared unenforceable by the California Attorney General and reduced for all practical purposes to merely 30 days before an election. (56 Ops.Cal.Atty.Gen. 365, 367 (1973) and 62 Ops.Cal.Atty.Gen. 365 (1979).)

b) A violation of the one-year requirement was alleged in *Fuller v. Bowen* (2012) 203 Cal.App.4th 1476, which involved rival candidates for a state senate seat. Fuller alleged that Bowen had not resided in the district for at least one year as required. The court did not address the constitutionality of the one-year requirement because it determined that a jurisdictional issue was dispositive.

The court relied on Cal. Const., art. IV, § 5, subd. (a), which states that each house of the Legislature "shall judge the qualifications and elections of its Members ...."

Thus, the court concluded that the legislature had the sole authority to judge the qualifications and elections of a candidate, even when a challenge to a candidate's qualifications is brought prior to a primary election. The scope of this jurisdictional prerogative will need to be addressed in the future.

III. Complaint Review Process

There are three types of residency complaints that a public integrity prosecutor will receive for review.

A. Public official moves out of the district

The first type of complaint arises when a current, legally seated public official moves out of the district during his/her term of office. Since the official was a legal resident at the time he filed his candidacy papers and initially registered to vote, there can be no criminal prosecution pursuant to E.C. § 18203, § 18100 or § 118.

If, however, the official moves out of the district permanently (changes domiciles) and continues to vote at the previous address he or she would be in violation of E.C. § 18500 and/or § 18501.

Once a council member, city clerk or treasurer moves out of the city, their office immediately becomes vacant by operation of law. (Government Code § 36502). However, as mentioned above, removal from office requires the filing of a *quo warranto* action.

B. Public official never lived in the district

The second type of complaint involves allegations that a seated public official never actually lived within the district he or she serves. Whether that type of complaint can be effectively investigated and prosecuted depends upon when, in relation to the election, the complaint was received. If the complaint is received shortly following the election, the matter can be effectively investigated and prosecuted.

Any delay between the time of the election and the time the complaint is received makes investigation more difficult. For example, it may be difficult to pinpoint the target's domicile at the time candidacy papers were filed if the complaint is received long after the election is held. If the delay is significant, as an alternative, the target's voting records can be examined to determine whether he or she continues to vote in violation of election laws.

C. Candidate for public office does not live in the district

The third type of complaint involves allegations that a candidate for public office does not live in the district. These are the easiest to investigate and prosecute. Because of the short time frame between the filing of false papers and the initiation of the investigation, domicile on the specific date of filing is more easily determined.

IV. The Four Common Scenarios

Although there may be some slight variations, there are generally four scenarios that public integrity prosecutors and investigators will encounter while investigating residency complaints.

A. No connection to the claimed residence

In some instances the target will have no actual connection to the residence claimed as his or her domicile and will not sleep or spend any time at the location. The residence may be that of a friend, relative or business associate of the target. The target may not keep any personal effects at the location. The target may be paying rent to the true owner so as to establish some legitimacy as a tenant.

This scenario presents the easiest case to investigate and prosecute. Minimal surveillance followed by simultaneous search warrants should provide much of the necessary evidence for a conviction.

B. The target may claim a parent's house in the district

The target's real or imagined political "juice" may derive from growing up in, and having long standing ties to, a district in which he or she no longer resides. Additionally, the target's parent(s) may be well known or have influence in the district. In this scenario, the target will claim his or her parents' home as his or her domicile.

Depending upon the target's age and immediate family status, these cases may be easy to prove or quite challenging.

a) A young, college age, target who still maintains a bedroom and keeps personal effects at the parents' home presents a prosecutorial challenge. Surveillance, search warrants and neighbor interviews may reveal a presence at both locations.

   In that situation, we would have to prove that the target intended, when he or she moved out of the family home, to permanently abandon that location as his or her domicile and to adopt the new residence as his or her domicile, a rather difficult task.

b) An older target with an established home and family of his or her own, who has been out of his or her parents' home for a significant length of time presents an easier case to prosecute. Surveillance, search warrants and neighbor interviews should confirm a limited presence at the claimed residence.

C. The target may move into temporary housing in the district

In some scenarios, the target will rent an apartment or a motel/hotel room within the district to establish residency for an election. He or she may actually move into the temporary residence or merely pay the rent. In either case, he or she will continue to maintain a permanent residence outside the district.

If it can be proven that the new residence is merely a sham, and that the candidate has not physically inhabited the location, the case can be easily prosecuted. Problems arise when the candidate actually moves into the new residence.

When a candidate occupies multiple residences, which one is his or her actual domicile? The issue becomes one of intent. Has he or she intended, by inhabiting the new residence, to make that his or her domicile? In other words, is that the "place in which his or her habitation is fixed, wherein the person has the intention of remaining, and to which, whenever he or she is absent, the person has the intention of returning?"

One way to prove his or her intent, or lack thereof, is to document what the candidate does following the election. If, after losing the election, he or she abandons the new residence and returns to what we believe to be the actual domicile, that would be evidence of his or her lack of intent to "remain" in the new residence.

D. Multiple residences

In the fourth scenario, the candidate may actually maintain two residences: one within the jurisdiction and one outside. These cases are the most challenging to prosecute. The determination as to which residence is the candidate's domicile will be based on the intent of the candidate. If he or she maintains a physical presence at both locations (sleeps at, and has personal effects at both locations) then his or her domicile will probably be deemed to be the location at which he or she is registered to vote, receives mail and registers automobiles.

V. The Time Line

The central issue in all residency investigations is: Where was the target's domicile on the "critical date" (the document filing date, voting date, signing date, etc.)?

Obviously, the longer the delay between the critical date and the receipt of the complaint, the more difficult it will be to establish domicile on that critical date.

One of the first tasks the investigator should undertake is to establish an accurate timeline. Included in that time line should be all of the critical dates, including the date any relevant documents were filed, the date the target registered to vote, the date the target voted, the date the target changed any existing records such as DMV records, postal records, school records, etc.

If the investigator can establish that the target's domicile during one of those critical dates fails to correspond to the address provided, charges can be filed.

Initiating the investigation immediately upon receipt of the complaint is extremely important, especially if the complaint is received prior to or during the election. The investigation will be much easier, and the chances for a successful prosecution significantly increased, if the investigation takes place shortly after the date of the criminal act.

VI. Investigation

We must establish that the target's domicile was other than that stated on his filed documents. Elections Code § 349 refers to "actions" and "intent."

Therefore, we must prove that the target resided in, and had the intent to stay in, the location we believe to be his or her actual domicile.

A. Establishing the critical dates

The documents containing the false domicile information or perjured statements regarding residency must be collected from the agencies with which they were filed to establish the critical dates. The city clerk can provide a copy of the candidacy papers. The Registrar-Recorder can provide a copy of the voter registration affidavit and a history of the target's voting record.

Once the critical dates are established, we must factually prove that the target was not domiciled at the address claimed on those dates. That is accomplished through old-fashioned investigation.

B. Surveillance

If investigative resources are available, surveillance is an excellent tool to assist in determining domicile. This can involve physically observing and following the target, placing an electronic GPS transmitter on the target's vehicle to monitor his or her movements and/or placing a pole camera at one or both locations to document the time spent at each location.

The questions that need to be answered include:

1) Where does the target go after work or after agency meetings?

2) From which residence does he or she leave in the mornings?

3) Regardless of which address is on his or her DMV registration, where are his or her cars kept?

4) Is there evidence of the target's spouse/children at either location?

C. Official records

Information can be acquired through public agencies that can assist in establishing the target's true domicile.

1. Postal records

Post office records can establish where the target currently receives mail. If the target filed a "change of address" with the post office to help establish his or her illegal residence, records of the previous address will aid us in establishing his or her true domicile. The date

that the change of address took place may be relevant to establish a time line for use at trial.

2. DMV records

The Department of Motor Vehicles can provide information as to the address the target uses to register any vehicles. Again, if there has been a recent change in registration address we can backtrack to establish the true domicile. Also, check for any recent changes of address on the target's driver license.

3. Utility records

Utility billing information is an excellent source of information, especially if the target is spending very little time at the claimed location. A comparison of electricity, gas and water usage at the two locations can establish how much time the target actually spends at each location.

4. Property tax records

The Los Angeles County Assessor's Office can provide information regarding the target's homeowners' exemption. A homeowners' exemption can only be taken on a dwelling which is occupied as the owner's principal place of residence.

If the target has multiple residences, a printout of the property tax information for each residence from the Assessor's Office will establish which property the target is claiming as his or her principal residence.

5. School records

If the target has school-age children, school records are an excellent source of information. Although the target may attempt to establish a temporary residence within the district for which he or she is a candidate, he or she will normally not take his or her children out of their current school and re-register them at a different school.

The school registration forms and emergency contact information forms should be checked for address information. Any recent address changes should be noted. If the claimed residence is not within the school district the investigator should check for records of any inter-district transfers or residency waivers.

6. Additional records

a) Check the information on all utilities and taxes for both locations. In whose name are the utilities? Who is paying the taxes on the residences?

b) Check DOJ/AFIS to see if there are any guns registered to the target. What address was given?

c) Check with the local police departments to see if there have been any recent calls for service at either residence. If so, who was contacted at the locations? What addresses were given?

d) Check with local agencies to see if there are any animals licensed at either location.

D. Landlord interview

If either residence is a rental, an interview with the owner or landlord can provide valuable information. Obviously, such an interview should only be done if it will not compromise the investigation.

a) The landlord can establish when the target first moved into the property, the length of the lease and any emergency contact information provided.

b) He or she may also be able to provide information as to how the rent is paid, i.e. cash or check. If by check, what is the address listed on the check? The target may not bother to order new checks imprinted with the temporary address.

c) If the landlord is on-site, he or she may be able to provide information as to how much time the target actually spends at the location and whether any furniture was actually moved into the property.

d) A follow-up interview with the landlord should be conducted after the election.

If the target was defeated in the election and immediately moved out of the location, that would be evidence of his or her lack of intent to permanently establish a domicile.

If the target won the election, he may feel safe to abandon the temporary residence and move back to his or her actual domicile.

E. Hotel/motel

If the residence listed in the campaign documents is a hotel/motel, the investigator should conduct interviews with the manager and/or front desk personnel unless it would compromise the investigation.

a) The investigator should gather information as to how long the target has resided at the motel/hotel.

b) The arrangement between the hotel/motel and the target should be examined to find out whether the rental agreement is day-to-day, week-to-week, or long term.

c) Questions should also be asked as to how often the target is seen at the hotel/motel, whether he or she receives messages, wake-up calls, etc., and whether he or she orders room service.

d) Housekeeping personnel should also be interviewed to establish whether the target's room is actually being used (bed, towels, food, etc.)

e) Again, follow-up interviews after the election should be done to determine the target's post-election actions.

F. Search warrants

The final action to be taken in a residency investigation should be the serving of search warrants at both the actual domicile and the purported domicile. These warrants should be served simultaneously and will usually yield critical evidence.

1. Timing of service

In a prosecution to establish actual domicile, it would be highly persuasive evidence to a jury that the defendant was at the domicile, going about his morning routine, when investigators served the warrant at 7:00 a.m. Prior surveillance establishing the target's habits can ensure that the target will be at the location at that time.

2. Layout of each residence

The search warrant teams should take note of the configurations of both residences, like the number of bedrooms.

They should also note the number of beds and whether they are currently being used. All residents should be questioned to establish

whether the number of beds matches the number of persons residing at each location.

It must be determined whether there is a physical space for the target to sleep at his or her purported residence and whether the physical evidence supports his or her claim of residency.

3. Inventory of each residence

A detailed inventory should be taken at each location that includes the description and location of the target's personal effects.

Personal items to be inventoried should include clothing, grooming products, medication, etc. Expiration dates on medication or grooming products should be noted to establish the time period of occupancy at the location.

4. Electronics

Personal phone books, PDAs or cell phones may contain the phone number/address of one of the locations. If the purported domicile is a relative's house, the target's true domicile may contain a personal phone book or rolodex listing that location as such.

5. Documentary evidence

Documentary evidence should also be seized.

a) Receipts can be probative to establish residency by showing where the target buys gas, groceries or rents videos. ATM receipts may also be helpful.

b) Utility, bank and employment records may also be helpful. Utility records, as mentioned above, have obvious probative value. Bank records may be found in, and may have been mailed to, the actual domicile.

Employment records at the actual domicile may also contain information corroborating residency. Those records may include emergency contact information provided to an employer listing the target's spouse at the true domicile.

6. Interviews

a) At the time the warrants are served, neighbors at both locations should be interviewed. Neighbors should be asked who lives at

each location and for how long. They should also be asked how often they see the target, his or her car, spouse and children.

b) Any family members present should also be interviewed at the time the warrants are served. Statements from young children can be especially helpful.

School-age children should be asked where they attend school. A follow-up with the school will establish the address provided to the school by the target for registration and emergency contact purposes.

Once the adult family members are identified, DMV and voter registration searches will reveal the address they are currently using for their domicile.

VII. Tactical Considerations

A. Spouse and adult children

If the target is married, he or she is put in the difficult situation of deciding at which domicile his or her spouse should be registered.

a) If the spouse remains registered at the family home outside the district while the target is registered at a residence within the district, he or she creates an issue regarding Elections Code section 2027, which states that the place where a person's family is domiciled is his or her domicile.

b) If the spouse registers at the claimed residence but remains living at the residence outside the district, serious consideration should be given to investigating and prosecuting the spouse as well.

In many cases, the spouse will make no attempt, other than registering, to establish a domicile within the district. None of the spouse's clothing or other belongings will be found at the claimed residence, none of the neighbors will remember seeing her or him at the claimed residence, etc.

c) A joint prosecution also creates a tactical problem for the defense attorneys at trial as they attempt to show that both spouses resided within the district when it will be painfully obvious that the spouse made no such effort.

B. Charge selection

1. Perjury

A perjury conviction requires proof that the false statement was material. As discussed above, the element of materiality should not be difficult to prove in residency prosecutions.

In cases involving a candidacy filing document or a voter registration affidavit, the domicile of the person filling out the document is clearly material because persons who do not reside within the district are ineligible to run for office or vote in elections.

California Constitution Article VII § 8 and Government Code § 1021 disqualify a convicted perjurer from holding public office in the state.

Per Government Code § 1770.2, an officeholder is immediately suspended from office upon a guilty plea or verdict, not at the time of sentencing.

Elections Code § 18100 and/or § 18203

Both false declaration of candidacy (G.C. § 18203) and false voter registration (G.C. § 18100) require knowledge, but neither require specific intent. A violation of § 18100 necessarily constitutes perjury. If candidacy papers require the candidate to sign under penalty of perjury, a violation of § 18203 may also constitute a violation of § 118.

Elections Code § 18560

Voter fraud (E.C. § 18500) should be filed if the candidate, in addition to registering to vote in a precinct in which he or she is not domiciled, actually casts a ballot in the precinct. A § 18560 conviction permanently disqualifies the defendant from holding public office.

2. Trial strategies

As in any trial, simplifying the issues for the jury significantly increases the probability of success at trial.

The issue, simply stated, is where was the defendant's domicile on the critical dates? (Those dates on which the defendant filed documents in which he or she listed false addresses.) If his or her actual domicile is different than that stated on the documents, he is guilty of all counts charged.

As discussed above, a case involving dual residences (one within the jurisdiction and one outside) will present the biggest challenge. Those cases should only be filed if there is sufficient evidence to establish that the residence outside the jurisdiction is in fact, the defendant's domicile.

It should be stressed to the jury that the defendant can have only one domicile and the issue becomes one of determining the defendant's intent (or lack thereof). A thorough investigation will yield sufficient compelling evidence to show which residence the defendant intended to be his or her domicile.

The following describes sample charging language for the crimes discussed herein and sample jury instructions.

C. Sample charging language

On or about _____ in the County of Los Angeles, the crime of **FALSE DECLARATION OF CANDIDACY,** in violation of ELECTION CODE SECTION 18203, a Felony, was committed by _____, who did file, or submit for filing to the [Registrar/Recorder of Los Angeles County] [city clerk of _____] a nomination paper, declaration of candidacy, and affidavit of nominee for the office of _____ , knowing that it or part of it had been made falsely.

D. Sample jury instructions

1. Government Code 36502

Councilmember, Clerk or Treasurer; Qualifications

Requested by People		Requested by Defendant		Requested by	
Given as Requested		Given as Modified		Given on court's Motion	
Refused					
Withdrawn					

_____
Judge

G.C. 36502

A person is not eligible to hold office as councilmember, city clerk, or city treasurer unless he or she is at the time of assuming office an

elector of the city, and was a registered voter of the city at the time nomination papers are issued to the candidate.

If, during his or her term of office, he or she moves his or her place of residence outside of the city limits or ceases to be an elector of the city, his or her office shall immediately become vacant.

2. Election Code 321
Elector Defined

Requested by People		Requested by Defendant		Requested by	
Given as Requested		Given as Modified		Given on court's Motion	
Refused					
Withdrawn					

_____
Judge

E. C. 321

"Elector" means any person who is a United States citizen 18 years of age or older and a resident of an election precinct at least 29 days prior to an election.

3. Election Code 359
Voter Defined

Requested by People		Requested by Defendant		Requested by	
Given as Requested		Given as Modified		Given on court's Motion	
Refused					
Withdrawn					

_____
Judge

E. C. 359
"Voter" means any elector who is registered under this code.

4. Elections Code 2032

More Than One Residence

Requested by People		Requested by Defendant		Requested by	
Given as Requested		Given as Modified		Given on court's Motion	
Refused					
Withdrawn					

_____
Judge

E. C. 2032

Except as provided in this article, if a person has more than one residence and that person has not physically resided at any one of the residences within the immediate preceding year, there shall be a rebuttable presumption that those residences in which he or she has not so resided within the immediate preceding year are merely residences as defined in subdivision (c) of Section 349 and not his or her domicile.

5. Elections Code 8066

Circulators Shall Be Voters In The District

Requested by People		Requested by Defendant		Requested by	
Given as Requested		Given as Modified		Given on court's Motion	
Refused					
Withdrawn					

_____
Judge

E. C. 8066

Circulators shall be voters in the district or political subdivision in which the candidate is to be voted on and shall serve only in that district or political subdivision.

6. Special 4

Requested by People		Requested by Defendant		Requested by	
Given as Requested		Given as Modified		Given on court's Motion	
Refused					
Withdrawn					

_____
Judge

The law presumes that a domicile, once acquired, continues until it is shown that a new domicile is acquired. At any given time, there can only be one domicile. Once established, a domicile cannot be lost until another is gained. Moreover, in order to change domiciles, there must be a union of act and intent. Thus our courts have held that two elements are indispensable to accomplishing a change of domicile: actual residence in the new locality plus the intent to remain there.

Demiglio v. Mashore (1992) 4 C.A. 4th 1260, 1268.

7. Elections Code 104

Declaration Of Circulator Form

Requested by People		Requested by Defendant		Requested by	
Given as Requested		Given as Modified		Given on court's Motion	
Refused					
Withdrawn					

_____
Judge

E. C. 104 – 1 of 2

Wherever any petition or paper is submitted to the elections official, each section of the petition or paper shall have attached to it a declaration signed by the circulator of the petition or paper, setting forth, in the circulator's own hand, the following:

- The printed name of the circulator.

- The residence address of the circulator, giving street and number, or it no street or number exists, adequate designation of residence so that the location may be readily ascertained.
- The dates between which all the signatures to the petition or paper were obtained.

Each declaration submitted pursuant to this section shall also set forth the following:

- That the circulator circulated that section and witnessed the appended signature being written.
- That according to the best information and belief of the circulator, each signature is the genuine signature of the person whose name it purports to be.

The circulator shall certify to the content of the declaration as to its truth and correctness, under penalty of perjury under the laws of the

8. Elections Code 104
Declaration Of Circulator Form

E. C. 104 – 2 of 2

State of California, with the signature of his or her name at length, including given name, middle name or initial, or initial and middle name. The circulator shall state the date and the place of execution on the declaration immediately preceding his or her signature.

9. Elections Code 2028
Place Of Family And Business

Requested by People		Requested by Defendant		Requested by	
Given as Requested		Given as Modified		Given on court's Motion	
Refused					
Withdrawn					

_____
Judge

E. C. 2028

If a person has a family fixed in one place, and he or she does business in another, the former is his or her place of domicile, but any person having a family, who has taken up an abode with the intention of

remaining and whose family does not so reside with him or her, is a domiciliary where he or she has so taken up the abode.

10. Elections Code 2024

Intention And Fact Or Removal

Requested by People		Requested by Defendant		Requested by	
Given as Requested		Given as Modified		Given on court's Motion	
Refused					
Withdrawn					

_____
Judge

E. C. 2024

The mere intention to acquire a new domicile, without the fact of removal avails nothing, neither does the fact of removal without the intention.

11. Elections Code 2027

Domicile Of Family

Requested by People		Requested by Defendant		Requested by	
Given as Requested		Given as Modified		Given on court's Motion	
Refused					
Withdrawn					

_____
Judge

E.C. 2027

The place where a person's family is domiciled is his or her domicile unless it is a place for temporary establishment for his or her family or for transient objects.

APPENDIX A

Juror Number _____

Juror Number

People v. RODERICK WRIGHT
BA361187

JUROR QUESTIONNAIRE

Thank you for your participation as a prospective juror in this case. The purpose of this questionnaire is to provide information to the court and counsel regarding your ability to serve as a fair and impartial juror and to make the jury selection process more efficient.

It is not our intention to embarrass anyone. While the questionnaire will be part of the public record of this case, your name will not be disclosed. The names of all prospective jurors are confidential and will not be available to any party without prior court approval. If you feel your answer to any particular question might be embarrassing or sensitive to you, you may request a private hearing with the judge and the attorneys to answer that question. Please mark such a question "Confidential". *This is an extremely time consuming process and should be reserved only for questions that will cause extreme difficulty.*

This written questionnaire is the first stage in the jury selection process. **PLEASE PRINT YOUR ANSWERS CLEARLY SO WE CAN READ YOUR WRITING. ANSWER ALL QUESTIONS CAREFULLY AND COMPLETELY.** Do not leave any blanks. If a question is not relevant to you, please write "N/A" for "not applicable" in the space provided. If you have trouble reading, understanding, or filling out any part of this questionnaire, please put a "?" next to the question. Additional space will be provided at the end of the questionnaire for added responses. During the second stage of jury selection, the judge and attorneys will have the opportunity to follow up on some of these questions in court. At that time, you will be given an opportunity to explain or expand any answers, if necessary. Although the questioning of jurors will be conducted in a public courtroom, all jurors' names will remain completely anonymous and will not be disclosed without prior court approval.

Please answer all questions by yourself, giving your very best effort to answer each question thoughtfully and honestly. **DO NOT DISCUSS THE QUESTIONNAIRE OR YOUR ANSWERS WITH ANYONE ELSE, INCLUDING YOUR FAMILY, FRIENDS, OR FELLOW JURORS.** When you have completed the questionnaire, please give it to the attendant. You will not be able to leave without turning in your completed juror questionnaire.

Print the last four digits of your juror number at the top of each page in the space provided. Please write on the page itself and/or in the margins. Do not write on the back of any page. **YOU MUST SIGN YOUR QUESTIONNAIRE. YOUR ANSWERS ARE SIGNED UNDER PENALTY OF PERJURY AND HAVE THE SAME EFFECT AS A STATEMENT GIVEN UNDER OATH TO THE COURT.**

Thank you for your full cooperation.

_____
Kathleen A. Kennedy
Judge of the Los Angeles Superior Court

GENERAL INFORMATION

1. Do you feel that you understand and can communicate in English well enough to fully perform your duties as a juror? _____Yes _____ No

2. Do you have any emotional, physical, or medical problems that would interfere with your ability to serve? Yes _____No_____
If **YES**, please explain: _____

BACKGROUND INFORMATION

3. Juror # (on badge) _____

4. Age: ___ Gender: ____ Male ____ Female Ethnicity / Race: _____

5. Birthplace: City, State, County_____

6. Area, neighborhood, or community where you live: _____
How long have you lived there? _____

7. What state assembly and senate district do you currently reside in?
_____

8. Do you: _____ Own ___ Rent ____Live with others and do not pay rent

9. Are you familiar with the Los Angeles County regions of the city of Inglewood or Baldwin Hills? _____Yes _____No

10. What is your highest level of education completed?
___ No School
___ Grade School
___ High School Graduate or GED
___ Some College, Major: _____
___ Associate Degree, Community/Junior College, Major: _____
___ Bachelor's Degree, Major: _____
___ Graduate or Professional Degree: _____ Type of Degree
Field of Practice: _____
___ Technical, Trade or Business School, Field or Major: _____
___ Other special training: _____

11. If you are a student, complete the following:
a. Major Area of Study: _____
b. Degree Sought: _____

12. While in school what was your strongest subject(s)? _____

13. What was your weakest subject(s)? _____

14. What person do you admire most and why? _____
_____

15. What person do you least admire and why? _____
_____

16. What is your current employment status? (Please check all that apply):

___ Employed Full Time
___ Employed Part Time
___ Homemaker
___ Full -Time Student
___ Unemployed
___ Other: _____
___ Looking for Work
___ Retired—When? _____
___ Disabled
___ Self - Employed
___ Part - time student

17. What is your current occupation? _____
a. Job Title: _____
b. Duties (describe briefly): _____
c. How long have you worked at your current job _____
d. Do you supervise other persons? ___ Yes ___ No
e. If yes, how many? _____
f. Do you hire and fire employees? ___ Yes ___ No
g. What other positions have you held there? _____
h. How many employees work for your employer? _____

18. Have you had any legal education, legal training, or related background?
_____Yes _____No If **YES**, please explain: _____

19. If you checked unemployed, retired or disabled above, please answer the following questions about your last job:
a. Job Title: _____
b. Duties (describe briefly): _____
How long were you at this job? _____
Reason you left? _____

20. Over the period of your working life, what types of jobs have you usually had? _____

21. Please list your last three jobs and employers. Include the date, location and your position. _____
_____
_____

22. Have you ever worked for the government? _____Yes _____No If **YES**, please specify what entity of the government _____

23. Have you done volunteer work? _____Yes _____No. If **YES**, please state the type of volunteer work done. _____

FAMILY

24. What is your current marital status? (Check all that apply):

___ Single and never married
___ Married
___ Separated
___ Divorced
___ Life partner
___ Widowed ___ Other: _____

Please answer the following questions with respect to your current spouse or partner. If separated, divorced or widowed, please answer with respect to your former spouse or partner.

25. What is the highest level of education that your spouse or partner completed?

Current Spouse	Former Spouse (Divorced/Widowed/Separated)
___ No School ___Grade School ___High School Graduate or GED ___Some College, Major: _____ ___Associate Degree, Community/Junior College, Major: _____ ___Bachelors Degree, Major: _____ ___Graduate or Professional Degree: Type of Degree: _____ ___Technical or Trade Field or Major: _____ ___ Other special training (i.e. certifications) Describe: _____	___ No School ___Grade School ___High School Graduate or GED ___Some College, Major: _____ ___Associate Degree, Community/Junior College, Major: _____ ___Bachelors Degree, Major: _____ ___Graduate or Professional Degree: Type of Degree: _____ ___Technical or Trade Field or Major: _____ ___ Other special training (i.e. certifications) Describe: _____

26. If your spouse or partner is a student, complete the following:

a. Major Area of Study: _____
b. Degree Sought: _____

27. What is your current spouse or partner's employment status?

___ Employed Part Time ___ Retired—When? _____

___ Homemaker
___ Full-Time Student
___ Unemployed
___ Other: _____
___ Disabled
___ Self-Employed
___ Part – time student

28. What are your spouse or partner's current occupation and employer? Or, if he/she is now retired, unemployed or disabled, what was his/her past occupation? _____
Employer: _____

29. What is your father's current or past employer and occupation?
_____

30. What is your mother's current or past employer and occupation?
_____

31. Do you have children ___ Yes ___ No, step-children ___ Yes ___ No
a. If yes, how many? _____Ages_____
b. If your children/step-children are adults, what are their occupations?
_____

32. Do you know any person connected to the court system, such as an attorney, judge, bailiff, clerk, or court reporter? _____Yes _____No
If **YES**, please explain: _____

33. Have you, or anyone close, ever had any contact with a Deputy District Attorney, District Attorney's Office, Attorney General, Attorney General's office, or used the services of any state or federal prosecutor's office?
_____Yes _____No If **YES**, please explain: _____

INTERESTS AND ACTIVITIES

34. What are your hobbies? _____

35. If you attend religious services what is the name of your church, synagogue, etc.? _____

36. Do you participate in any community organizations such as your neighborhood homeowners association, neighborhood watch, school groups such as the PTA, religious organizations, fraternities or sororities, social, political, professional, unions etc.? _____Yes _____No
If **YES**, please explain: _____

37. Would you describe yourself as a leader or a follower? Please explain:
_____

38. Have you, a family member or close friend ever participated in, donated to, belonged to, signed a petition for, or supported any group concerned with the following:

Defendants' rights	_____	Victims' rights	_____
Prisoners' rights	_____	MADD	_____
Civil rights	_____	Brady Bill	_____
Amnesty International	_____	National Center for Victims	_____
The Innocence Project	_____	Of Crimes	
ACLU	_____	Other Similar Organization	_____

If you marked any of the above, please explain: _____
b. Have you ever held a leadership position in any of the above organizations?
___ Yes ___ No Which one(s)? _____

39. Are you a member of any boards? If **YES,** please explain: _____

40. Are you a member of any political organizations? _____Yes _____No
If **YES**, please explain: _____

41. Have you ever assisted at the polls on Election Day? ____Yes ____No
If **YES**, please explain: _____

42. Have you, or anyone close, been a candidate for, or appointed to, any public or political office, or worked for anyone who held such office?
_____Yes ____No If **YES**, please explain: _____

43. Have you ever campaigned for any proposition, referendum, or law concerned with reforming the criminal or civil justice system? ___ Yes ___ No
If **YES**, please explain: _____

44. Have you or anyone close, ever contributed to any political or judicial election campaign? _____Yes _____No If **YES**, please explain:
_____

45. Have you or someone close to you ever sought political office? If so, what office? _____Yes _____No If **YES**, please explain the office and the result.
_____

46. Have you or someone close to you ever worked or held a position (paid or unpaid) in a political campaign? _____Yes _____No If **YES**, please explain:
_____

47. Have you or someone close to you worked for someone that held a political office? _____Yes _____No If **YES**, please explain:

_____

48. Do you know or have any professional or personal relationships or affiliations with any elected public officials or government employees? _____Yes _____No If **YES**, please explain: _____

b. Do you ever talk with that person about anything regarding the position he or she holds (held)? _____Yes _____No If **YES**, please explain: _____

49. Generally speaking, what is your opinion of politicians? _____

_____

50. Have you, or anyone close to you, ever had a negative experience with any politician? _____

51. Do you have any opinions about how the justice system treats or should treat politicians accused of crimes? ____ Yes ____ No If **YES**, please explain: ___

_____

52. Do you believe that more or less evidence should be required to prove a politician is guilty of a crime than would be required in a trial of other persons? _____Yes _____No If **YES**, please explain: _____

53. Do you believe that politicians should be held to a lower, higher, or the same standard of obeying the law as other persons?
_____Lower standard _____Higher standard _____Same standard
Please explain: _____

b. Do you believe that any public official that allegedly beaks the law should be prosecuted to the fullest extent of the law? _____Yes ____No Please explain:

_____

54. Do you believe that most politicians are honest people? _____Yes _____No Please explain: _____

55. Which of the following best describes your feelings:
_____It is more important to follow the "letter of the law" than the "spirit of the law."
_____It is more important to follow the "spirit of the law" than the "letter of the law."
_____It is equally important to follow the "spirit" and the "letter of the law."

____I don't know (I am not sure)

56. How often do you vote in elections for public offices, initiatives or measures?
Always_____More often than not_____Half of the time_____
Rarely_____Never_____

57. In terms of political outlook, do you think of yourself as?
Very conservative _____ Somewhat conservative _____ Moderate_____
Somewhat liberal_____ Very liberal_____ Other _____

58. Do you know the names of the following individuals that represent you?
City council _____
State assembly_____
State senator_____
County supervisor_____

59. What is your *primary or main* source of news?
Newspaper ___ Other (please describe)_____
Television ___
Radio ___
Internet ___
Magazines ___
Family/Friends__
Twitter ___
Facebook ___
MySpace ___

60. What newspapers or magazines (news, entertainment, science, etc.) do you read on a regular basis? _____

61. Do you read The Los Angeles Sentinel newspaper? _____Yes _____No

62. Have your read opinions or commentaries in the newspaper made by Senator Roderick Wright? _____Yes _____No

b. Do you currently have an opinion about State Senator Roderick Wright?
_____Yes _____No If YES, please explain: _____

c. Would your opinion prevent you from being a fair and impartial juror in this case? _____Yes ____No

63. What Internet sites or blogs, if any, do you visit on a regular basis? _____
_____

64. Do you post blogs or participate publicly on any Internet sites?
_____Yes _____No If **YES**, which one(s)? _____

b. Have you accessed or posted any logs concerning State Senator Roderick Wright? _____Yes _____No If **YES**, please explain: _____

65. Do you listen to radio news on a regular basis?
Yes, national news _____ Yes, local news _____ Yes, both ____ No___
If yes, which station(s)/program(s)/host(s)? _____

66. Do you regularly watch news on television?
Yes, national news__ Yes, local news___ Yes, both___ No___
If yes, which station(s)/program(s)/host(s)? _____

67. Do you watch television shows that discuss or focus on criminal and/or investigative cases? Yes, regularly___Yes, occasionally_____No_____
If yes, which ones? _____

68. Over the past several years, have you followed any publicized cases?
___ Yes ___ No If **YES**, which ones? _____
a. Why did these case(s) interest you? _____

69. Are there any issues or causes in your life that you have felt strongly enough about in the past to join a group, write a letter to the editor, call in a talk show, or take some other action? _____Yes _____No If **YES**, please explain: _____
_____

TRAINING AND EXPERIENCE

70. Do you, or anyone close, have any law enforcement training, background, or experience? (E.g. police, sheriff, jail or prison official, government investigator, prosecutor, parole or probation officer, juvenile authority, FBI, secret service, highway patrol, customs, guard, corrections, homeland security, marshal, bounty hunter, etc.) _____Yes _____No
If **YES**, describe any agency, rank, dates of service, disciplinary action or hearings. _____

71. Have you ever served in any branch of the military, including the National Guard, the reserves or ROTC? _____Yes _____No
If **YES**, describe any agency, rank, dates of service, disciplinary action or hearings_____

72. Do you consider yourself to have special training or knowledge or to be an expert on any subject? ___ Yes ___ No If **YES**, please explain: _____

EXPERIENCES WITH THE LEGAL SYSTEM

73. Have you, or anyone close, ever had work, social, or other contact with any law enforcement officers, agencies, or groups? _____Yes _____No

If **YES**, please explain _____

74. Describe your general feelings toward law enforcement officials: _____
_____

75. Do you believe the testimony of a law enforcement officer is entitled to greater, lesser or equal weight than that of other witnesses?
_____ greater weight
_____ lesser weight
_____ equal weight

76. Have you, or anyone close to you had a negative experience with any lawyer or have negative feelings about lawyers for any reason? _____Yes _____No
If **YES**, please explain: _____

77. Generally speaking, what is your opinion of prosecuting attorneys?
_____
78. Generally speaking, what is your opinion of criminal defense attorneys?
_____

79. If you were t hear the testimony of several individuals, please rank the order of "Credibility" from 1 though 6 that you would assign for each person For example: #1 = credible and #6 =most credible.
Police officer _____ Attorney _____ Politician _____ Ordinary Citizen___
Expert witness _____ Private or Government Investigator_____

80. Have you ever been a witness or given a statement in any type of legal proceeding? _____Yes _____No If **YES**, please explain:
_____

81. Have you ever participate in a lawsuit, whether as a plaintiff, defendant, or witness? _____Yes _____No If **YES**, please answer the following:

a. Who was suing (show as the plaintiff)? Who was being sued who was the defendant?)
_____
b. Please describe your role in the case and how the case came about:
_____

c. What was the outcome of the case? Were you satisfied with it? ___
_____

82. Have you ever served on a jury? _____Yes _____No
If yes, please provide the following information:
Year Civil or Criminal Matter Charges or Type of Case was there a verdict?

(Circle yes or no **only**)

_____ Yes or No
_____ Yes or No
_____ Yes or No
_____ Yes or No
_____ Yes or No

b. If a verdict was not reached in any of the above cases, why not?

_____

c. What did you think of your jury experience(s)? _____

83. Have you ever served as a jury foreperson? ___ Yes ___ No
    a. If **YES**, how many times? _____

84. If you sat on the jury and your fellow jurors were unable to agree on the verdict how would you feel about that? Please explain: _____

b. Would you feel a sense of failure or incompleteness in not being able to agree on a verdict? Please explain: _____

85. Do you know any person connected to the court system, such as an attorney, judge, bailiff, clerk, or court reporter? ____ Yes ____ No
If **YES**, what is their relationship to you? _____

86. Have you ever had any interaction with the court system?
___Criminal Court ____Civil Court ___Small Claims Court
___Probate Court ____Family Court ___Traffic Court
___ Other If **YES** to any of the above, do you think you were treated fairly?
_____Yes _____ No If **NO**, please explain: _____

87. Have you ever been a witness or given a statement in any type of legal proceeding? _____Yes _____ No If **YES**, please explain:

_____

_____

88. Have you or anyone close to you ever been the victim of or a witness to any type of crime? _____Yes _____ No If **YES**, please explain: _____

_____

a. Was anyone arrested and/or charged with the crime even if the case did not come to court? ___ Yes ___ No
Please explain the situation: _____

b. Was there a conviction? ___ Yes ___ No ___ Awaiting trial

c. If there was a ___ jury trial ___ bench trial (Judge only) or a _____guilty plea?

d. How has this experience affected your feelings about the criminal Justice system? _____

89. Have you ever called a law enforcement agency to assist you in any manner? _____ Yes _____ No If **YES**, please explain: _____

a. Do you feel you were treated fairly? ___ Yes ___ No
If **NO**, please explain: _____

90. Have you or anyone in your family or close to you ever been Accused of, Arrested for, Charged with, or Convicted of any crime or been the subject of a criminal investigation of any type? ___ Yes ___ No If **YES**, please explain the circumstances and how the matter was resolved: _____
b. Do you feel you/they were fairly investigated, accused, arrested, charged or convicted? _____ Yes ___ No If No please explain: _____
_____

91. Do you feel that law enforcement; the court system, a lawyer, or the legal system ever treated you or a person close to you badly, unfairly, or unprofessionally? Yes___ No___ If **YES**, please explain: _____

92. Is there anything about the criminal justice system that makes you angry? _____ Yes _____ No If **YES** please explain: _____

93. Do you think our legal system unduly favors the prosecution? ___ Yes ___ No If **YES**, please explain: _____

94. Do you think our legal system unduly favors the defense? ___Yes ___ No
If **YES**, please explain: _____

95. Do you have any anger, resentment, and negative feelings/opinions toward any law enforcement agency in Los Angeles or elsewhere?
___ Yes ___ No If **YES**, please explain: _____

b. Would this affect your opinion of a law enforcement officer who testifies as a witness? _____Yes ___ No If **YES**, please explain:
_____

96. Would any of your experiences or opinions affect your ability to be a fair, unbiased, and impartial juror? ___Yes ___ No If **YES,** please explain:
_____

97. Would you automatically find the testimony of a law enforcement officer to be more credible, less credible, or about the same as any other witness?
____More credible ____Less credible ____About the same

CASE KNOWLEDGE, EXPOSURE, OPINIONS

The defendant has been charged with perjury by declaration, filing false declaration of candidacy and fraudulent voting. He has pled not guilty. This section of the questionnaire will ask you questions about what you have heard about this case.

98. Do you know or recognize the defendant, the prosecutors, the defense attorney, the judge or any other court personnel involved in this case?
___ Yes ___ No If **YES**, please explain: _____

99. Are you familiar with the name State Senator Roderick Wright?
_____Yes _____No____ If **YES**, please explain how you are familiar with the name: _____

100. Have you, someone in your family, or someone close to you ever met State Senator Roderick Wright or anyone associated with him? (For example, his family, friends, co-workers, etc.) _____Yes _____No If **YES**, please explain:
_____

101. Have you ever heard State Senator Roderick Wright speak at a public event either in person or via other media sources? _____Yes _____No If **YES,** please explain: _____

b. Did you form an opinion about him based on that encounter?
_____Yes _____No If **YES,** please explain: _____

102. Are you aware of news coverage regarding this case?
___ Yes, very aware ___Yes, somewhat aware ___ No
If **YES**, what have you seen, read or heard about this case? _____

103. What has been your major source of information about this case?
_____

104. How closely have you followed this case?
___Very closely ___Somewhat closely ___Not at all

105. Have you received information about this case from sources outside of the media coverage? _____Yes _____No If **YES**, please explain: _____

106. Have you formed an opinion based on the coverage of the case?
Yes_____ No_____ If **YES**, please explain: _____

107. Do you have any personal knowledge about this case?
_____Yes _____No If **YES**, please describe how you gained your knowledge and the scope of your knowledge: _____

108. Have you already formed an opinion about the guilt or innocence of the Senator Roderick Wright? _____Yes _____No If **YES**, please explain: ___
_____

109. Has the defendant ever been elected to represent the district in which you, someone in your family or someone close to you lives? _____Yes _____No
If **YES** – do you have an opinion about his performance as a State Senator?

b. Would your opinion prevent you from being a fair, impartial and unbiased juror in this case? _____Yes _____No If **YES,** please explain _____

110. Would the fact that the defendant is a State Senator cause you to automatically favor one side or the other? _____Yes _____No If **YES**, please explain: _____

111. Are you familiar with Tolliver's barbershop in Los Angeles? ____Yes _____No If **YES** please explain: _____

112. There may be public officials or politicians that are called as witnesses during the trial. Would their profession and position cause you to give more weight to their testimony? _____Yes ____No If **YES**, please explain:
_____

113. There may be spectators in the courtroom that have an interest in the case. Is there anything about seeing a number of spectators in the courtroom that would make it difficult for you to concentrate on the evidence and reach a fair and impartial decision at the conclusion of the case? ____Yes _____No
If **YES**, please explain: _____

114. The media may cover the trial. You are instructed not to read about this case (on the internet, newspapers, etc.), access or post any blogs, listen to anything, text anyone, tweet anyone, or watch any coverage of this case from now on. Do you promise to follow this instruction? ___ Yes ___ No If **NO** please explain: _____

115. There may be portions of the trial when cameras and reporters are allowed in the courtroom. Jurors will not be filmed. Is there anything about the presence of cameras or news reporters that would make it difficult or impossible for you to be completely fair and impartial during this case? ___ Yes ___ No If **YES**, please explain: _____

OTHER EXPERIENCE

116. Is there any reason (for example, a relationship, a life experience, a philosophy, or a religious belief) that would prevent you from engaging in deliberations or returning a verdict of guilty or not guilty in this case?
___ Yes ___ No ___ Not Sure If **YES** or **NOT SURE**, please explain:
_____

117. It is a fundamental principle of American law in a criminal case that a defendant is presumed innocent. Would you have any difficulty following this law? Yes___ No _____If **YES**, please explain: _____

118. At this stage of the proceedings, no evidence has been produced. A criminal defendant is presumed not guilty, and if you were asked to vote right now, you would have to vote not guilty. Do you agree with this statement?
____ Yes ____ No If No please explain: _____

119. It is a fundamental principle of American law that in a criminal case it is the prosecution's burden to prove the defendant guilty beyond a reasonable doubt. Would you have any difficulty following this law? Yes ____No___ If yes, please explain: _____

120. Jurors in a criminal case must presume a defendant innocent until the contrary is proved. Do you feel that because the defendant has been brought to trial that he is probably guilty? ____ Yes ____ No IF **YES**, please explain:
_____

121. It is a fundamental principle of American law that a defendant has an absolute right to remain silent and not testify, and that you cannot discuss or even consider the exercise of this right. If you had to sit through a trial that lasted several week and the defendant (a politician) did not choose to testify would you assume that he is guilty of the allegations against him? _____Yes _____No
Please explain: _____

122. Both direct and circumstantial evidence are acceptable as a means of proof. Neither is entitled to greater weight than the other. Would you have any difficulty in following this law? ___ Yes ___ No If **YES** please explain:
_____

123. You must decide this case without regard to punishment or penalty. Will you comply? ___Yes ___ No If **NO**, please explain: _____

124. Would you like to serve on this jury? _____Yes _____No If No, Please explain: _____

125. Does the simple fact that a trial involves many witnesses and documents, and lasts several weeks, skew your impression of the prosecution of defendant?

_____Yes _____No If **YES**, please explain: _____

b. How do you determine if someone is telling the truth to you? _____
_____

126. Is there anything about you that this questionnaire does not address that you think might be important for the attorneys and the judge to know?
_____Yes _____No If **YES**, please explain: _____

127. Is there anything about you that would or could affect your ability to decide this case fairly and impartially without bias or prejudice and base your decision only on the evidence and the law that you are instructed on by the judge?
___Yes ___ No If **YES**, please explain: _____

128. If chosen as a juror on this case, can you set aside everything you have read, heard, seen or said about both this case and the defendant, as well as all prior feelings and opinions you might have about the case and the defendant, and render a just and true verdict based solely on the evidence presented in court and the law provided by the Judge in this case? ____Yes _____No If **NO** please explain your answer: _____

129. If you are selected as a juror in this case, will you be concerned about reactions to your verdict by anyone, including family, friends, minister, church parishioners, co-workers, stranger, or the media? ____YES ____NO
IF **YES**, please describe: _____

130. Are you currently taking any prescription medications? _____Yes
_____No If **YES**, please explain: _____

131. Have you or any members of your family ever experienced the following? (Check off as appropriate): _____drug addiction _____alcohol addiction
_____severe depression _____severe emotional problems _____
_____severe behavioral problems _____poor impulse control _____
_____psyhiatric illness _____constant nightmares _____constant flashbacks
_____other Please explain: _____

132. Describe any pressing medical, personal, family or business matters that could affect your ability to serve as a jury, or (b) any ethical, religious, political or other beliefs that could affect your ability to serve as a juror. _____

133. Is there anything you would like to add? ___ Yes ___ No
If **YES**, please explain: _____

134. The attorneys may need to ask you follow up questions. Are there any questions you would prefer to discuss in private? _____Yes _____No
If **YES** please write the question numbers here:

135. Do you know or recognize any of the attorneys or potential witnesses named on the attached list? _____**YES**_____**NO**
If yes, explain:

_____

_____

Attorneys:
Winston Kevin McKesson, representing Mr. Wright
Anita Olp, representing Mr. Wright
Michele Gilmer, Deputy District Attorney
Bjorn Dodd, Deputy District Attorney

Potential Witnesses:

Mr. Alejandro Olvera	Los Angeles County Registrar Recorders Office
Ms. Hinot Shenkute	
Ms. Mary Bryant	
Ms. Wilma Callender	
Mr. Bernard Tolliver	
Mr. Lawrence Tolliver	
Ms. Lannee Basulto	Los Angeles City Clerk Election Division
Rene Torres	
Martha Torres	
Mica Green	
Wanda Sanders	
Felicia Porter	
Vanessa Kirkwood	Southern California Edison
Maria Heaney	Finance Supervisor for the city of Inglewood
Harjinder Singh	Finance Supervisor for the city of Inglewood
Christopher Briggs	Investigator - District Attorney's Office
Dana Hidalgo	State Senate Counsel's Office
Trish Mayer	Fair Political Practices Commission
Christina Gibson	Department of Motor Vehicles
Wayne Wohler	Department of Water and Power
Custodian of Records	A T & T
Brenda Garcia	Custodian of Records – Hamilton High School
Custodian of Records	Protection One Security
Donato Garcia	L. A. County Board of Supervisors Executive Office
Maria Grimaldo	Investigator – District Attorney's Office
Jeffery Scott	Investigator – District Attorney's Office
Gilbert Miranda	Investigator – District Attorney's Office
Seth Fogel	Investigator – District Attorney's Office

Mayor Willie Brown
Robert Hertzberg
Malcolm Bennett
Cine Ivory
Wanda Sample
Gregory Smith

APPENDIX B

JACKIE LACEY
District Attorney of Los Angeles County
By: BJORN DODD; State Bar No. 191612
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(213) 974-6508

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. RODERICK WRIGHT, Defendant.	Case No. BA361187 **MOTION PURSUANT TO EVIDENCE CODE SECTION 402 TO EXCLUDE OR LIMIT EVIDENCE OFFERED BY DEFENSE** Date: January 7, 2014 Time: 1:30 PM Court: Department 109

TO THE HONORABLE KATHLEEN A. KENNEDY, JUDGE PRESIDING IN DEPARTMENT 109, AND DEFENDANT:

Please take notice that on January 7, 2014, the People will move that the trial court exclude or limit evidence offered by the defense, including from the named expert witnesses.

This motion will be based upon the attached points and authorities and any other oral or written evidence presented at the hearing.

Dated: January 6, 2014

Respectfully submitted,

JACKIE LACEY
District Attorney of Los Angeles County

By _____
BJORN DODD
Deputy District Attorney

I.

INTRODUCTION

On December 28, 2013, the defense sent a letter to the People containing notice of the expected testimony of expert witnesses they intend to call at trial. The descriptions for both Robert Hertzberg and Mayor Willie Brown included the following:

> [Witness] is expected to testify that Senator Roderick Wright complied with all residency requirements when he filed, ran and proved victorious in his run for the California State Senate.
>
> He will base that opinion on his knowledge, training and experience, all of which is listed in the Wikipedia page provided to the People. He will also rely on the following documents to form the basis of his opinions; the attached November 23, 2009 memorandum prepared by Strumwasser and Woocher and the attached February 9, 1992 George Hatch Los Angeles Times article. Additionally, he will rely on the information contained in the attached December 26, 2013 Jim Miller Sacramento Bee article.

The description for Mayor Brown then added: "In addition, the Mayor will testify regarding the environment and purpose surrounding the drafting and passage of Section 2026 of the California Elections Code."

The defense proposed exhibit list, filed January 2, 2014, includes number (5) "News articles relied upon by defense experts," and number (6) "Memorandum relied upon by the defense experts."

Without receiving specific notice, the People anticipate that the defense might also seek to introduce either expert or lay witness testimony regarding work or accomplishments by defendant as a State Senator or in any other official capacity.

For the reasons discussed below, the People object to this proffered and anticipated evidence from the defense. Pursuant to the Evidence Code and case law outlined below, the People will request that the court exclude particular subjects of testimony and the exhibits identified.

II.

SCOPE OF PERMISSIBLE EXPERT WITNESS OPINION TESTIMONY

Evidence Code section 801 frames the general scope of permissible opinion testimony by an expert witness.

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

However, "[e]xpert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness." (*People v. Torres* (1995) 33 Cal.App. 4th 37, 45; *In re Cheryl H.* (1984) 153 Cal.App. 3d 1098, 1121.)

> [T]he decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that

> the opinion of an expert would assist the trier of fact. (*People v. Torres, supra,* 33 Cal.App. 4th 37, 45, quoting *People v. Cole* (1956) 47 Cal.2d 99, 103.)

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III.

"RESIDENCE" AND "DOMICILE" ARE NOT PROPER SUBJECTS FOR EXPERT OPINION TESTIMONY

For voting purposes, the terms "residence" and "domicile" are defined in Elections Code section 349. There is no separate definition which applies just to candidates for elected office. The statute reads:

> Residence for voting purposes means a person's domicile. The domicile of a person is that place in which his or her habitation is fixed, wherein the person has the intention of remaining, and to which whenever he or she is absent, the person has the intentions of returning. At a given time, a person may have only one domicile.
> The residence of a person is that place in which the person's habitation is fixed for some period of time, but wherein he or she does not have the intention of remaining. At a given time, a person may have more than one residence.

In *People v. Mayer* (2003) 108 Cal.App. 4th 403, the defendant was charged with perjury, Pen. Code § 118(a), and filing a false declaration of candidacy, Elec. Code § 18203, for falsely claiming a residence in a city to run for city council when in reality he lived outside of the city. In his defense, he sought to have a seasoned politician testify as an "expert" witness and express his opinion that the term "residence" was "an ambiguous term which in the world of politicians means something different than the place where one actually lives." (*Id.* at p. 414.) The defendant also sought for the proposed "expert"

witness to testify "that the meaning of the term 'residence' in the 'political world' had a different meaning from that word used in the statutes." (*Ibid.*) The court rejected the notions in the proffered opinions: "We are not prepared to accept the proposition that 'residence' has one meaning for elected officeholders and candidates for election to public office, but a different and universally recognized meaning for all other persons." (*Ibid.*) Thus, because there was no special meaning of "residence" for politicians, the court confirmed the trial court's ruling that the proposed "expert" was not qualified to testify as an expert on the meaning of "residence' in the political arena. (*Id.* at p. 415.) "[Elections Code] Section 349 does not exempt politicians from its requirements. Expert opinion testimony on this issue was properly excluded." (*Id.* at p. 414.)

Likewise, in this case, the proposed "expert" witnesses should not be permitted to testify regarding "residence" and "domicile." Their proffered opinion testimony is that defendant "complied with all residency requirements." But given that "residence" for politicians has the exact same meaning as "residence" for all other persons, there is no "subject that is sufficiently beyond common experience that the opinion of an expert would assist the tier of fact." (Evid. Code § 801(a).) Simply, because the same definitions of "residence" and "domicile" apply to politicians and the common person alike, the common person is as much of an "expert" as the proposed defense "experts" from his or her own experience of residing and having a place of "fixed habitation" as defined in the statute. "'Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates.'" (*People v. Torres, supra,* 33 Cal.App. 4th 37, 47.)

IV.

EXPERT OPINION TESTIMONY IS NOT ADMISSIBLE AS TO QUESTIONS OF LAW

Expert witness opinion testimony may be admissible as relating to questions of fact. However, opinion testimony is not admissible as to questions of law. The proffered opinion testimony of the defense experts would relate only to questions of law, not questions of fact. Therefore, the opinion testimony should be excluded.

"Early in our state's judicial history our Supreme Court held the definition of a statutory term is a matter of law on which the court should instruct the jury; it is not a subject for opinion testimony." (*People v. Torres, supra,* 33 Cal.App. 4th 37, 45, citing *People v. Carroll* (1889) 80 Cal. 153, 158.) "It is the court and not the witness which must declare what the law is, it not being within the province of a witness, for example, to testify as to what constitutes larceny or burglary." (*People v. Torres*, *supra*, 33 Cal.App. 4th 37, 45-46, quoting *People v. Clay* (1964) 227 Cal.App.2d 87, 98.) "[L]eaving the definition of statutory terms to be proved or disproved in every case 'would lead to great uncertainty in the administration of justice.'" (*People v. Torres*, *supra*, 33 Cal.App.4th 37, 46, quoting *People v. Carroll*, *supra*, 80 Cal. 153, 158.)

In *People v. Torres*, *supra*, 33 Cal.App.4th 37, a police officer testified as an expert witness and expressed his opinions on the statutory definitions of the offenses of robbery and extortion. The reviewing court ruled that such opinion testimony was completely inadmissible because it concerned questions of law. (*People v. Torres*, *supra*, 33 Cal.App.4th 37, 46.)

In *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App. 4th 1155, the case concerned a

wrongful death suit resulting from a car accident. An expert witness testified that in his opinion the defendant trucking company was vicariously liable for the acts or omission of the co-defendant truck driver involved in the accident. The expert witness also gave opinion testimony regarding the application of the nondelegable duty doctrine to the defendant trucking company. The trial court admitted the opinion testimony characterizing it as a factual opinion. The trial court further explained that the expert could "testify as to his understanding of California law," but not "as to what California law actually is, and the jury will be instructed that the law is what the Court tells them that it is, not what a witness thinks that it is." (*Summers v. A.L. Gilbert Co., supra,* 69 Cal.App. 4th 1155, 1171.)

The reviewing court found that the trial court erred in viewing the expert testimony as a factual opinion. "The manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion." (*Summers v. A.L. Gilbert Co., supra,* 69 Cal.App. 4th 1155 1179, quoting *Ferreira v. Workmen's Comp. Appeals Bd.* (1974) 38 Cal.App. 120, 126.) The reviewing court ruled that the admission of the expert opinion testimony was error requiring reversal of the verdict. It further clarified that "expert opinions on legal questions are not admissible regardless of whether the opinion embraces an ultimate issue." (*Summers v. A.L. Gilbert Co., supra,* 69 Cal.App. 4th 1155, 1179, citing *Downer v. Bramet* (1984) 152 Cal.App. 3d 837.)

People v. Mayer, supra, 108 Cal.App. 4th 403, involved issues of residency similar to the instant case. Mayer claimed that he believed that the law did not require him to actually sleep at the address he had set up in the City of South Gate in order to run for city council. His view was that such mistaken belief was one of fact, thus entitling

him to a mistake-of-fact jury instruction. He reasoned that if "he actually believed that his definition [of residence] was correct, then he is not guilty of any of the charges." (*People v. Mayer, supra,* 108 Cal.App. 4th 403, 412.) The reviewing court pointed out, "Appellant's 'mistake' was his belief that the law did not require him to sleep in South Gate. This is a mistake of law, not one of fact. A mistake of fact would exist if, for example, appellant honestly but mistakenly believed that the place where he slept was in the City of South Gate. (*Ibid.*)

In the instant case, the entire proposed opinion testimony of the defense "expert" witnesses concerns only questions of law. The opinion testimony would not address questions of fact such as whether defendant slept at the Glenway Drive residence, or even spent any particular amount of time there. Rather, the opinion testimony would improperly address the meaning of "residence" and "domicile," and improperly suggest that the jury should read more into the law beyond the plain language in the instructions to be given by the court. Furthermore, the testimony would improperly draw conclusions by applying the particular facts to the law. As set forth above, all these subjects are completely outside of permissible expert opinion testimony. Therefore, all testimony on these subjects must be excluded.

V.

INVASION OF THE PROVINCE OF THE JURY

"A witness cannot express an opinion concerning the guilt or innocence of the defendant." (*People v. Torres, supra,* 33 Cal.App. 4th 37, 46.) Neither can a witness "express[] an opinion as to whether a crime has been committed." (*Id.* at p. 47.) "Even if

an expert's opinion does not go to a question of law, it is not admissible if it invades the province of the jury to decide the case." (*Summers v. A.L. Gilbert Co., supra,* 69 Cal.App. 4th 1155, 1182.) "'Undoubtedly there is a kind of statement by the witness which amounts to no more than an expression of his general belief as to how the case should be decided.... It is believed all courts would exclude such extreme expressions." (*Ibid.*) "There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witness; and in any event it is wholly without value to the trier of fact in reaching a decision. [Citation.] Notwithstanding Evidence Code section 805, an 'expert must not usurp the function of the jury...." (*Id.* at p. 1183, quoting *People v. Humphrey* (1996) 13 Cal.4th 1073, 1099.)

In this case, the proposed defense "expert" witness opinion testimony is essentially an attempt to parade well-known political figures before the jury to express that they think no crime has been committed and that the defendant is not guilty. Such testimony is irrelevant, improper and inadmissible.

VI.

INADMISSIBILITY OF CONTENT OF EXPERT WITNESS REFERRENCE MATERIALS

The law provides clear limitations upon what matters an expert can testify on direct examination. As set forth in *People v. Campos* (1995) 32 Cal.App.4th 304, 308:

> An expert witness may not, on direct examination, reveal the content of reports prepared or opinions expressed by nontestifying experts. The reason for this is obvious. The opportunity of cross-examining the other doctors as to the basis for their opinion, etc., is denied the party as to whom the testimony is adverse. (Citations omitted.) This rule does not preclude the cross-examination of an expert witness on

> the content of such reports. As the court noted in *Mosesian v. Pennwalt Corp.* (1987) 191 Cal.Ap.3d 851, 864 [236 Cal.Rptr.778], '[p]rocedurally, if an expert does rely in part upon the opinions of others, the expert may be cross-examined as to the content of those opinions. It is improper, however to solicit the information on direct examination if the statements are inadmissible. [Citations.]

Therefore, the People request the court to exclude the following exhibits identified in the defense proposed exhibit list: (5) New articles relied upon by defense experts, and (6) Memorandum relied upon by the defense experts.

VII.

TESTIMONY OF DEFENDANT'S WORK OR ACCOMPLISHMENTS IS IRRELEVANT

Should the defense attempt to introduce evidence of defendant's work or accomplishments as a State Senator or in any other official capacity, the People object because it would be irrelevant. The charges against defendant do not relate to any actions by him as a State Senator or in any other official capacity. Rather, the charges stem from his actions as a private citizen registering to vote and then filing necessary documents to be a candidate for public office. Any evidence of work or accomplishments in an official capacity have no relevance to the issue of his intent at the times he registered to vote, filed candidate declarations and voted in subsequent elections. Therefore, the People request that the court exclude all such evidence.

VIII.

CONCLUSION

For the reasons discussed above, the People respectfully request that the court exclude or limit the evidence offered by the defense.

DATE: _____

Respectfully submitted,

JACKIE LACEY
District Attorney

By:
BJORN DODD
Deputy District Attorney

Chapter 7

ELECTION ISSUES

I. Introduction

As part of its mission, the Public Integrity Division is responsible for investigating and prosecuting violations of the California Elections Code. The penal provisions of the Elections Code are found at sections 18000 through 18700. Violations of some of the penal sections are prosecutable as felonies while others are prosecutable only as misdemeanors. In cases where the statute does not specify a fine, section 18001 allows for a fine of up to $1,000 for misdemeanors and $25,000 for felonies.

In addition to specific prohibitions, section 18002 of the Elections Code creates criminal liability for any person charged with the performance of any duty relating to elections who willfully neglects or refuses to perform such duty or who knowingly and fraudulently violates any statute within the Elections Code. A violation of Section 18002 is punishable by a fine or state prison.

When analyzing a complaint involving an alleged violation of one of the non-criminal sections of the Elections Code, a determination should be made as to whether or not the target is a "person charged with the performance of any duty relating to election." If so, a willful failure to perform that duty, or a knowing violation of even a non-criminal statute, could result in criminal prosecution.

II. Voter Registration

All United States citizens, 18 years old or older, who are residents of the State of California, and are not in prison or on parole, are eligible to vote. (California Constitution Article II, section 2; EC §2000; EC §2101.) A voter may vote at any election held within the territory within which he or she resides and the election is held (EC §2000).

In order to vote, a person must be registered as a voter by filling out and submitting an *Affidavit of Registration* (EC §2102). Those persons who are deemed to be mentally incompetent by a court are disqualified from registering to vote (EC §2208).

The Affidavit of Registration shall contain the voter's name, residence, mailing address, date of birth, state of country of affiant's birth, political party preference, a certification that the voter is a citizen of the United States and shall be signed under penalty of perjury (EC §2150). Other than certification on the affidavit, a voter does not need to independently prove citizenship (EC §§2111 and 2112).

A. Registration of non-eligible voter

Every person who registers to vote, or who causes another to be registered, knowing that they are not entitled to be registered, is guilty of a *wobbler* (EC §18100(a)).

This includes registering a non-citizen, a mentally incompetent person or a person not domiciled within the voting precinct.

Those not competent to vote include: those for whom a conservator has been appointed and those who have been found not guilty of a crime by reason of insanity (EC §18102).

1) Signing, or procuring, on an affidavit of registration, the signature of a nonexistent person and delivering the affidavit to the county elections official is also a wobbler. A "nonexistent" person includes deceased persons, animals and inanimate objects. (EC §18100(b)).

2) Filling out an affidavit of registration or a voter registration card, even partially, with the intent to cause the registration of a fictitious person or a person who has not requested to be registered is a wobbler (EC §18101). This charge should be considered in cases in which a paid contractor (explained below) fills out voter registration forms with names and addresses obtained from the telephone book or other source.

3) Section 18102 creates a wobbler for any elections official who registers a fictitious or non-existent person. Obviously, prosecuting the elections official for violating sections 18100(b) or 18101 as an aider and abettor or co-conspirator should also be considered.

B. Interfering with the registration process

Knowing or negligent interference with the prompt transfer of completed affidavits of registration to the elections official is a misdemeanor violation of E.C. §18103.

It is also a violation of that section to retain a voter's registration card for more than three days. This scenario could occur during a voter registration drive where a member of one political party fails to turn in the voter registration forms of those voters from another political party.

1) Section 18104, also a misdemeanor, more specifically prohibits any deputy registrar of voters from knowingly failing to return completed registration cards.

2) Altering or defacing the applicant's party affiliation on the affidavit of registration without the consent of the voter is a violation of E.C. §18106, a wobbler.

C. Registering voters for pay

Political organizations sometimes hire independent contractors to register eligible voters. These contractors may be paid hourly or be paid a set fee for each voter that they register.

1) An Affidavit of Registration will be provided to the voter to complete and sign and the paid contractor will then return the completed forms to the Registrar-Recorder directly, or return them to the organization for delivery to the Registrar-Recorder.

2) Elections Code §2159 requires those who are paid to register voters to sign their full name on the Affidavit of Registration and to include their name, address and phone number, as well as the name, address and phone number of the organization that hired them to register voters. The penal sections of the Elections Code used to enforce section 2159, are sections 18108, 18108.1 and 18108.5.

3) Pursuant to section 18108, failure to comply with E.C. 2159 is a misdemeanor. Section 18108.1 creates a misdemeanor for paid signature gatherers who knowingly misrepresent that they assisted another to register to vote. Section 18108.5 is a similar statute that applies to those who obtain affidavits and are paid on a per-affidavit basis.

   All three criminal statutes increase the misdemeanor fine from $1,000 maximum for a first and second offence to $10,000 maximum for a third offense.

III. Nomination Of Candidates

Prior to a candidate's name appearing on a ballot, the candidate must file nomination papers or a declaration of candidacy with the elections official of the jurisdiction in which the candidate is seeking office. The requirements, which are contained in the city/county charter, municipal code or local elections code, differ depending upon the jurisdiction.

A. False filing of a nomination paper

Knowingly filing a nomination paper or declaration of candidacy containing false information is a wobbler. (E.C. §18203). This section should be considered in cases in which a candidate lists a false residence address in his declaration of candidacy in order to qualify as a candidate in a district in which he is not eligible

to hold office. Requirements vary among jurisdictions and some cities/districts do not require a candidate to list his or her residence on the nomination forms or declarations of candidacy.

B. Destruction of a nomination paper

It is a wobbler to deface, destroy (E.C. §18201) or suppress (E.C. §18204) a nomination document or declaration of candidacy. In jurisdictions which require that nomination papers contain a required number of signatures of registered voters of the district, it is a felony to sign the name of another or of a fictitious person. (E.C. §18200).

IV. Inducing A Candidate To Refrain From Running

Paying money or other valuable consideration to induce another to withdraw as a candidate, or not to run for office, is a felony violation of E.C. §18205.

In cases in which a candidate offers an opponent a governmental appointment, instead of money, in exchange for the opponent withdrawing from the race, consider the ruling in *People v. Robinson*,(130 Cal. App. 664 (1930)).

In *Robinson*, the defendant was charged with extortion (P.C. 518) for threatening to publish an article which would be embarrassing to a judge unless the judge agreed to appoint the defendant as a receiver in a case pending before the judge. The appellate court held, "It has been settled law for many years that a public office, quasi-official or otherwise, is not 'Property' within contemplation of the statutes nor of the Constitution."

Under *Robinson*, if appointment to a public office would not be considered "property" under P.C. 518, it is questionable whether it would be considered "other valuable consideration" under E.C. 18205.

The argument could be made that the accompanying salary of an appointed position could constitute "valuable consideration," but the *Robinson* opinion includes the following language, "The prospective salary or other emoluments of a public office are not property of the officer, nor the property of the state. They are not property at all."

Although a "public office" may not be considered property, the offer of a paying city job would more likely be considered to be something of value. There are no cases on point but it seems logical that the salary and benefits associated with a city or school district job would be considered valuable consideration.

V. Election Campaigns

A. Campaign literature

There are several Election Code sections intended to prevent deceiving voters through the use of misleading campaign literature.

1. Simulated ballots

It is a misdemeanor, in violation of E.C. §18301, to print or duplicate a simulated ballot that does not contain the language required by E.C. §20009 identifying the ballot as not being official and identifying the person or organization preparing the simulated ballot. Section 18301 also prohibits the use of an official seal or insignia on the simulated ballot or on the envelope in which it is mailed.

2. Deceptive use of official seals

A more general prohibition on the use of official seals in campaigns is found in E.C. §18304, which prohibits the use of the reproduction of the seal of any local agency in any campaign literature or mass mailing with intent to deceive voters. A violation of section 18304 is a misdemeanor. In any case involving the use of an official seal in campaign literature, also consider Penal Code section 472, a wobbler, which prohibits the use of a forged public seal with intent to defraud.

3. Deceptive use of reproduction of official seals

Government Code §34501.5 prohibits the use of a reproduction or facsimile of a city seal in any campaign literature or mass mailing with intent to deceive.

Subsection (b) of that section states: "For purposes of this section, the use of a reproduction or facsimile of a seal in a manner that creates a misleading, erroneous, or false impression that the document is authorized by a public official is evidence of intent to deceive."

A "mass mailing," as referred to in the sections mentioned above, is defined in Government Code §82041.5 (Political Reform Act) as over 200 substantially similar pieces of mail. Excluded from the definition is mail sent in response to an unsolicited request or inquiry.

4. Misrepresentation of precinct location

Section 18302, makes it a misdemeanor to knowingly mail or distribute materials to a voter which misleads him or her as to the location of their precinct polling place.

(For a more in-depth discussion of the penal statutes relating to political mailers, see the Political Mailer section of this manual.)

B. Political Party Caucuses

There are two sections in the Elections Code relating to the endorsement, nomination or election of candidates to represent a political party. Both of the sections are felonies. Section 18310 prohibits paying or receiving consideration to reward a person for voting for a particular candidate. Similarly, section 18311 prohibits offering or receiving a bribe with the intent to influence a person to be more favorable to one candidate over another.

C. Deceptive online activities

Added to the Elections Code in 2003, the California Political Cyberfraud Abatement Act (sections 18320 through 18323), is not a penal statute but it does make it unlawful for any person, with the intent to mislead, deceive or defraud, to commit an act of political cyberfruad. In addition to any other civil remedies available, a court may order the transfer of a domain name as part of the relief awarded for a violation.

Political cyberfraud is defined as a knowing and willful act, committed with the intent to deny a person access to a political web site, deny a person the opportunity to register a domain name for a political web site, or cause a person reasonably to believe that a political web site has been posted by a person other than the person who posted the web site, and would cause a reasonable person to believe the site actually represents the views of the proponent or opponent of a ballot measure.

Political cyberfraud includes: intentionally diverting or redirecting access to a political web site to another person's web site; intentionally preventing or denying exit from a political web site by the use of electronic measures; registering a domain name that is similar to another domain name for a political web site; intentionally preventing the use of a domain name for a political web site by registering and holding the domain name or by reselling it to another with the intent of preventing its use.

A "political web site" is a site that urges the support or opposition to a measure.

D. Political meetings

It is a misdemeanor for anyone to use threats, intimidation or violence to willfully hinder or prevent electors from assembling in public meetings to discuss public questions. (E.C. §18340)

E. Misrepresentation by candidates

Because of First Amendment issues, there are only a few criminal statutes directly relating to the content of candidate statements that are intended to mislead voters. For example:

1) During a campaign, any candidate who, with the intent to mislead voters, pretends or implies by word or conduct that he or she is an incumbent, or a public officer, is guilty of a misdemeanor. (E.C. §18350)

2) Elections Code section 13307 allows candidates for nonpartisan elective offices in public agencies to prepare a candidate's statement and file it with the appropriate elections official for inclusion in the elections materials sent out with the sample ballots to voters.

3) Section 11327 allows public officers in a recall election to also file a candidate's statement. The statement may include the candidate's name, age, occupation and a brief (no more than 200 words) description of the candidate's education and qualifications.

4) Any candidate in an election, or incumbent in a recall election, who knowingly makes a false statement of a material fact in a candidate's statement with the intent to mislead the voters is guilty of a misdemeanor and subject to a fine of not more than $1,000. (E.C. §18351.)

   It should be noted that there is no similar criminal statute that prohibits the making of a false or misleading statement about a candidate's background, experience, education or qualifications in a political mailer. As a result, a candidate statement appearing in official election materials cannot be intentionally misleading but a statement appearing in a paid political mailer may be misleading without violating any criminal statute.

F. Solicitation of funds in the name of a political party

Elections Code section 20201 makes it unlawful for a person or committee to solicit funds by including the name of a political party in its name without the political party's permission. Section 20201 is not a criminal statute, but Elections Code §18360 makes any violation of 20201 a misdemeanor.

Similarly, Elections Code sections 20202 and 20203 prohibit a person or committee from soliciting funds for a candidate or committee by using the name of the candidate or committee in its name without the authorization of the candidate or committee. Elections Code §18361 makes a violation of E.C. 20202 or 20203 a misdemeanor upon complaint of the affected candidate or committee.

G. Electioneering

The term "electioneering" is not defined in the Elections Code, nor are there any known cases defining the term. Webster's New World Dictionary defines the term electioneer as: to canvass votes for, or otherwise work for the success of, a candidate, political party, etc. in an election.

There are two Elections Code sections which prohibit electioneering in the vicinity of voters while they are casting their ballots.

1) Section 18370 prohibits certain activities within 100 feet of a polling place at times when voters are casting ballots.

   The activities prohibited are: circulating petitions or initiatives; soliciting a vote; speaking to a voter about the marking of his or her ballot; speaking to a voter about his or her qualifications; placing a sign relating to a voter's qualifications; and any other electioneering. The 100 foot distance is measured from the room in which voters are casting ballots, not from the property line.

2) E.C. 18541 prohibits intimidating voters with the intent to dissuade them from voting within 100 feet of a polling place. Common violations includes vehicles that park in front of polling locations on election-day with advertisement of candidate on display and voters who refuse to cover candidate names when standing in line to vote.

3) Elections Code section 18371 prohibits candidates, and their representatives, from soliciting the vote of an absentee voter, or from any electioneering, while in the voter's residence or in the immediate presence of the voter while the voter is voting. The statute also applies to proponents or opponents, and their representatives, of initiatives, referendums or recall petitions. Violation of either section 18370 or 18371 constitutes a misdemeanor.

H. Vandalism at polling places

Elections Code §18380 prohibits vandalism at polling places during elections. The statute prohibits removing, defacing or destroying signs, cards or supplies within voting booths, polling places or within 100 feet of polling places. A violation of section 18380 is a misdemeanor.

Section 18380 does not apply to the destruction or removal of campaign signs. Since no Elections Code statute specifically prohibits the destruction or removal of campaign signs, as a matter of policy, the Public Integrity Division does not investigate or prosecute allegations of campaign sign theft or vandalism.

I. Ballots

1) Manufacturing or furnishing to others any paper or ballot cards printed, watermarked or overwritten in imitation of ballot paper or ballot cards is a felony in violation of E.C. 18400. The purpose of the statute is to prevent the creation of counterfeit ballots for the purpose of election fraud.

2) Using the printed ballot paper or ballot cards to print or distribute a counterfeit ballot is a misdemeanor in violation of E.C. 18401. Distributing counterfeit vote by mail ballot applications violates E.C. 18402, a misdemeanor.

3) The collection of a completed, voted ballot by anyone other than an election official or precinct board member is a felony in violation of E.C. 18403. Any candidate or campaign worker who collects a completed vote by mail ballot for the purpose of transporting the ballots to the election official (i.e., city clerk) is in violation of this statute.

4) There are certain circumstances under which someone other than the voter can legally transport the completed ballot to the election officer. For example, pursuant to E.C. 3017(a), a vote by mail voter who, because of illness or other physical disability is unable to return the ballot, may designate his or her spouse, child, parent, grandparent, grandchild, brother, sister, or a person residing in the same household as the vote by mail voter to return the ballot to the elections official.

   Elections Code section 3017(e) specifically states, "notwithstanding subdivision (a), no vote by mail voter's ballot shall be returned by any paid or volunteer worker of any general purpose committee, controlled committee, independent expenditure committee, political party, candidate's campaign committee, or any other group or organization at whose behest the individual designated to return the ballot is performing a service. However, this subdivision shall not apply to a candidate or a candidate's spouse."

   Although subsection (e) is poorly drafted, the purpose appears to be to clarify subsection (a) to prohibit paid or volunteer campaign workers from returning completed vote by mail ballots even if they are the designated family member of a voter too ill or disabled to return his or her own ballot. The last sentence of subsection (e) provides an exception for candidates and their spouses, so that a designated family member of a voter pursuant to subsection (a), who also happens to be a candidate (or the spouse of a candidate), would still be eligible to return the completed ballot for his or her ill family member.

In addition to the criminal penalties for the person illegally returning the voted ballot, in accordance with E.C. 3017(d), the ballot will not be counted.

J. Voter/election fraud

Pursuant to Elections Code section 18500, any person who commits, or attempts to commit, fraud in connection with any vote cast is guilty of a felony. Any public official who knowingly commits election fraud is forever disqualified from holding public office in addition to any criminal penalties (E.C. 18501). Although section 18500 prohibits "fraud in connection with any vote cast," the term "fraud" is not specifically defined.

Interfering with a voter's right to vote, or with the officers holding an election, is a felony in violation of E.C. 18502.

K. Corruption of voters

There are several Elections Code sections that prohibit the offering of consideration to a voter in order to influence the voter to vote for a particular candidate or to refrain from voting.

1) Section 18520 prohibits the offering of employment or a public office to a voter and section 18521 prohibits offering money or any gift to the voter.

2) Section 18522 also prohibits any controlled committee from paying, lending or contributing money or other consideration to persuade or dissuade a voter. A controlled committee is defined in Government Code section 82016 as a committee controlled by a candidate.

3) It is a felony, in violation of Elections Code section 18523, to pay money with the intent that the money be used as a bribe in any election.

4) Paying money to be used to house a voter within a precinct with the intent of securing the vote of the voter or to induce to voter to vote for a particular candidate or measure is a felony in violation of E.C. 18524.

L. Intimidation of voters

1) Threatening or using force or violence to compel a person to vote for a particular candidate or measure or to refrain from voting is a felony in violation of E.C. 18540. It is also a violation to hire someone else to threaten the voter.

2) Section 18541 prohibits specific acts within 100 feet of a polling place with the intent to dissuade voters from voting.

   The prohibited conduct includes: speaking to a voter on the subject of his qualifications or the subject of marking his ballot; placing signs relating to voters' qualifications; photographing or video recording voters entering or exiting a voting place. The 100 feet extends from the room in which voters are casting ballots, not from the property line. A violation of 18541 is a felony.

3) Including threatening documents relating to elections in an employee's pay envelope is a misdemeanor in violation of E.C. 18542.

4) Elections Code section 18543 prohibits conduct intended to prevent voters from voting or to delay the voting process.

   The prohibited conduct includes challenging a person's right to vote for any reason listed in section 14240 of the Elections Code. It is not a crime for a precinct board member to challenge a voter's right to vote as long as there is probable cause for the challenge.

VI. Petitions, Measures And Circulators

There are sections of the Elections Code dealing specifically with the circulating of petitions for the purpose of obtaining signatures for an initiative or referendum to appear on a ballot.

Paid circulators or signature gatherers are frequently used by initiative proponents to obtain the required number of signatures of registered voters. Since they are often paid per signature obtained, there always exists the temptation to forge the signatures of actual voters, or even non-existent people.

A. False affidavits by circulators

1) A petition for a statewide election may only be circulated, and signatures obtained, by a registered California voter, or one who is qualified to register to vote in California (EC §9021).

   Countywide petitions may only be circulated by a registered voter of the county (EC §9108) and municipal petitions may only be circulated by a registered voter of the city (EC §9207).

2) Each circulator must attach to the petition an affidavit signed under penalty of perjury and stating that the circulator is a registered voter of (or qualified to register to vote in) the city (EC §9209) or the state (EC §9022).

Regardless of whether the petition is statewide, countywide or citywide, the circulator must also attach an affidavit under penalty of perjury stating that he or she witnessed the signatures being written (EC §104).

Problems arise when professional circulators are hired and brought into a jurisdiction for the purpose of gathering signatures. The circulators gathering the signatures may not be registered voters of the jurisdiction as required and therefore will be unable to sign the affidavit required by sections 9022 or 9209.

A common scenario involves the paid circulator gathering the signatures and subsequently a local registered voter signing the affidavit and submitting the petition. Depending on the specific wording of the affidavit, the registered voter who was not directly involved in signature gathering may be committing perjury.

3) Anyone who knowingly makes any false return, certification or affidavit regarding an initiative, referendum or recall petition or the signatures thereto is guilty of violating Elections Code §18660, a wobbler. Section 18661 prohibits the same conduct by public officials and employees.

B. Misrepresenting a petition's content or purpose

While gathering signatures for an initiative or petition, the circulator cannot intentionally mislead those signing the petition as to the content of the document or its purpose.

1) Elections Code section 18600, a misdemeanor, prohibits the circulator from intentionally misrepresenting or making false statements concerning the contents or effect of the initiative or petition.

2) It is also a misdemeanor to refuse to allow the prospective signer to read the petition (EC §18601) or to cover up or obscure the Attorney General's summary of the measure (EC §18601.5).

C. False signatures

1) A circulator who circulates a petition knowing that it contains false, forged or fictitious names is guilty of a felony (EC §18611).

2) By filing with the elections officer a petition that the circulator knows contains false, forged or fictitious names, the circulator violates EC §18614, a wobbler.

3) Those who sign the petition with a fictitious name, or who forge the name of another person, are guilty of EC §18613.

4) Paying someone for their signature on a petition is also a misdemeanor (EC §18603).

D. Attempting to prevent circulation or filing of a petition

1) It is a wobbler for any person to solicit money, or anything of value or advantage, to persuade the proponents of a petition to stop obtaining signatures or to fail to file the petition (EC §18620).

   It is also a wobbler for the proponent of the petition to solicit or obtain any money or thing of value for stopping or abandoning the petition or refusing to file it (EC §18621). Buying, or offering to buy, a petition upon which signatures are affixed, is a misdemeanor (EC §18622).

2) In addition to any other penalties, any person who threatens to commit an assault and battery on a petition circulator, or to damage his or her property, with the intent to dissuade the circulator from circulating the petition is guilty of a misdemeanor (EC §18630).

   Forcibly taking a petition, to which at least one signature is affixed, from the possession of a circulator is a misdemeanor (EC §18631).

3) A paid circulator who obtains signatures on a petition and then refuses to return the petition to the proponents for filing is guilty of a wobbler (EC §18640). Allowing the list of signatures on a petition to be used for any other purpose is a misdemeanor (EC §18650).

E. Misuse of initiative or referendum campaign funds

Elections Code §18680 declares that anyone entrusted with funds to be used for the purpose of promoting or defeating an initiative, referendum or recall petition is a trustee and any wrongful appropriation of the funds for a purpose other than the due execution of the trust is punishable as a wobbler. Section 18680 lists expenses which are considered to be within the execution of the trust:

(a) Securing signatures;
(b) Circulating the petition;
(c) Conducting public meetings;
(d) Printing;
(e) Advertising;
(f) Postage;
(g) Shipping;
(h) Telegraphing;
(i) Telephoning;
(j) Salaries;
(k) Maintaining headquarters;

(l) Rent;
(m) Attorney's fees.

F. Obligation of precinct board

Any voter who files an application, and is appointed to a precinct board, and fails, without excuse, to act as a precinct board member is guilty of a misdemeanor in violation of Elections Code section 18700.

APPENDIX A

California Elections C ode
Division 18
Penal Provisions

§ 18100.	Violations; imprisonment
§ 18101.	Willful registration of fictitious person or person not requesting registration; violations; imprisonment
§ 18102.	Deputy or registration elections official; violations; imprisonment
§ 18103.	Interference with transfer of completed affidavits of registration; unauthorized retention or denial of right to return registration cards; misdemeanor
§ 18104.	Deputy registrars; failure to return affidavits of registration; misdemeanor; report; civil or criminal action
§ 18105.	Affidavit of registration or voter registration card; statement in support of opposition of candidates by other than registrant; misdemeanor
§ 18106.	Tampering with party affiliation declaration
§ 18107.	Voter registration cards; distribution; violations; infraction
§ 18107.5.	Electronic submission of absentee ballot application for another registered voter; violation; offense; penalty
§ 18108.	Registration assistance for consideration; failure to comply with statutory requirements; misdemeanor; penalties; exemptions
§ 18108.1.	Registration assistance for consideration

§ 18108.5.	Affidavit records; notice of noncomplying affidavits; failure to comply with statutory requirements; offense; penalties; exemptions
§ 18109.	Misuse of voter registration information; violation
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§ 18237.	Repealed by Stats.1975, c. 1203, § 8, operative July 1, 1976
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Chapter 8

CAMPAIGN CONTRIBUTION DISCLOSURE AND LIMITATIONS

I. The Political Reform Act (PRA)

The Political Reform Act (PRA) was placed on the ballot as an initiative and approved by the voters of California in June of 1974, and took effect in January of 1975. The PRA encompasses Government Code sections 81000 through 91015. The purpose of the PRA, as stated in Government Code §81002, is to ensure fairness and transparency in political campaigns and to prevent conflicts of interest by public officials and employees. The sections of the Act regulating conflicts of interest are addressed in the chapter of this manual entitled "Conflicts of Interest."

A. Fair Political Practices Commission (FPPC)

The Fair Political Practices Commission (FPPC) was created as part of the PRA. The commission consists of five appointed members and has the responsibility of administrating and implementing the PRA. In addition, the commission provides opinions and advice to public officials, creates the reports that the PRA requires officials to file, and prepares instructional and training materials for public officials.

B. FPPC Procedures

The FPPC provides opinions and advice to those who are subject to the requirements of the PRA. The opinion procedure is much more formalized than the procedure for issuing advice, which can be quite informal.

1. Requests for opinions

Questions regarding how the PRA is to be interpreted are resolved by written opinions issued by the entire commission. Requests for opinions must be submitted in writing.

a) Prior to issuing an opinion, the commission holds a public hearing on the request at which time any interested person can submit briefs or arguments. At the hearing, the person requesting the opinion can present oral testimony. The commission's opinions are public records and may be published (GC §83114(a); 2 CCR 18320; 2 CCR 18322).

b) If the person who requested the opinion **acts in good faith** on an opinion issued by the commission, he or she **shall not be subject to criminal or civil penalties** as long as the material facts are as stated in the opinion request. Immunity only extends to the person identified in the opinion request (2 CCR 18320).

2. Requests for formal advice

Those who are subject to the PRA may also seek formal advice from the commission. Formal advice must be requested in writing.

a) The advice will be provided by FPPC staff, as opposed to the commission as a whole, and will apply the PRA to the particular set of facts provided by the requestor.

b) Anyone who **relies in good faith** on **written advice** cannot be subject to enforcement proceedings by the commission. However, unlike those who rely in good faith on FPPC opinions, those who rely on written advice are not provided immunity from criminal prosecution.

1) Their good faith reliance can be "used" in a civil or criminal prosecution if the requester, at least 21 working days prior to the alleged violation, requested written advice from the commission in good faith, disclosed truthfully all the material facts, and committed the acts complained of either in reliance on the advice or because of the failure of the commission to provide advice within 21 days (GC §83114(b)).

2) It is unclear what "use" a violator would make out of such reliance in a criminal prosecution other than an equitable argument pre-filing or at sentencing. This limited immunity is only available to the person requesting the advice. (2 CCR 18329).

3. Requests for informal assistance

Persons subject to the PRA may also request informal assistance, but, unlike the process for opinions and formal advice, it is not limited only to those subject to the PRA. Informal assistance can also be requested by agencies whose employees are subject to the PRA and by those whose duty it is to advise others as to their duties under the PRA. Informal assistance may be requested orally or in writing and will be provided by an FPPC staff member. There is no immunity provided to those relying on informal assistance. (2 CCR 18329).

II. Violations of the PRA

The FPPC has the authority to administratively enforce the PRA and may issue orders requiring violators to pay a fine of up to $2,000 per violation.

a) Pursuant to Government Code §91000, a knowing or willful violation of any provision of the PRA is a misdemeanor, subject to a maximum sentence of six months in county jail and a fine of up to $10,000 or three times the amount that the defendant illegally expended, contributed, accepted or failed to report. Even though violations of the PRA are misdemeanors, section 91000(c) establishes a four year statute of limitations.

b) Section 91001 gives the district attorney the authority to enforce the criminal provisions of the Act. Violations which occur within a charter city may be prosecuted by the city attorney of such city.

c) No one convicted of a misdemeanor violation of the PRA can be a candidate for any elective office, or act as a lobbyist for a period of four years following the date of the conviction.

III. Campaign Disclosure

In the interest of campaign disclosure, all elected officers, candidates, committees and slate mailer organizations must periodically file a series of forms created by the FPPC. A knowing and willful failure to timely file the required forms can be prosecuted as a misdemeanor.

A. Definitions

For purposes of interpreting and enforcing the PRA, the following definitions are used:

1. Who is a candidate

Candidate is defined in GC §82007 as "an individual who is listed on the ballot or who has qualified to have write-in votes on his or her behalf counted by election officials, for nomination for or election to any elective office, or who receives a contribution or makes an expenditure or gives his or her consent for any other person to receive a contribution or make an expenditure with a view to bringing about his or her nomination or election to any elective office, whether or not the specific elective office for which he or she will seek nomination or election is known at the time the contribution is received or the expenditure is made and whether or not he or she has announced his or her candidacy or filed a declaration of candidacy at such time." The

term "candidate" also includes any officeholder who is the subject of a recall election."

2. What is a contribution

A contribution is defined in GC §82015 as "a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received, unless it is clear from the surrounding circumstances that it is not made for political purposes."

3. What is an expenditure

Government Code §82025 defines an expenditure as "a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment, unless it is clear from the surrounding circumstances that it is not made for political purposes."

4. What is a committee

A committee is defined in GC §82013 as any person or combination of persons who directly or indirectly: receives contributions totaling one thousand dollars ($1,000) or more in a calendar year; makes independent expenditures totaling one thousand dollars ($1,000) or more in a calendar year; or makes contributions totaling ten thousand dollars ($10,000) or more in a calendar year to or at the behest of candidates or committees.

B. Reporting

1. Candidates

a) Prior to accepting or expending any campaign contributions all candidates must file a *Candidate Intention Statement* (Form 501) indicating the office the candidate is seeking. The candidate statement must be filed prior to the solicitation or receipt of any contribution or loan by the candidate (GC §85200).

b) If the candidate is going to accept any contributions he or she must set up a separate bank account in which to deposit the funds (GC §85201).

c) All contributions must be deposited into the campaign contribution account and all expenditures must also be made from the account (GC §85201). A recipient of campaign contributions cannot *commingle* those funds with his or her personal funds (GC §84307).

2. Political committees

a) The PRA also requires all political committees that receive $1,000 or more in contributions (referred to as a "recipient committee") to file, within a calendar year, a *Statement of Organization Recipient Committee* (Form 410) with the Secretary of State within 10 days of qualifying as a committee (GC §84101).

In other words, within 10 days of receiving $1,000 or more in a calendar year, thus qualifying as a recipient committee, the statement of organization must be filed.

b) Section 84100 of the Government Code requires that all committees have a *treasurer* and that no expenditure can be made without the authorization of the committee treasurer.

c) All candidates, elected officials and committees must also periodically file *Recipient Committee Campaign Statements* (California Form 460) detailing all contributions and expenditures. (GC §§84200, 84200.5, 84200.6, 84200.7, 84200.8, 84218).

d) All contributions and expenditures must be reported, including the source of the contribution and the recipient and purpose of the expenditure. Additionally, all loans made, or received, by the candidate or committee must be reported (GC §84216, GC §84216.5).

3. Slate mailer organizations

Slate mailer organizations must also file Form 410 and appoint a treasurer. A slate mailer organization is defined in GC §82048.4 as "any person who, directly or indirectly, is involved in the production of one or more slate mailers and exercises control over the selection of the candidates and measures to be supported or opposed in the slate mailers or who receives or is promised payments totaling $500 or more in a calendar year for the production of one or more slate mailers."

A slate mailer is a mass mailing which supports or opposes a total of four or more candidates or ballot measures (GC §82048.3).

4. Campaign statement filing procedures

a) There are specific deadlines for the filing of campaign statements. Semiannual statements must be filed no later than July 31 for the six month period ending June 30 and no later than January 31 for the six month period ending December 31 (GC §84200).

b) Elected county officers and candidates for county offices must file their campaign statements with the county clerk. Committees formed to support or oppose county candidates or ballot initiatives are also required to file with the county clerk. Candidates for city offices, and elected city officials, must file their campaign statements with the city clerk. (GC §84215).

IV. Independent Expenditures

A. Definition

An independent expenditure is defined in GC §82031 as "an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee."

B. Reporting requirements

a) A truly "independent" expenditure, that is, one not made at the behest of or in coordination with a candidate, need not be reported by the candidate as a campaign expenditure or contribution on his campaign statement.

However, any independent expenditure of $1,000 or more in a calendar year made by any person or committee, supporting any candidate or ballot measure, must be reported in a *Major Donor and Independent Expenditure Committee Campaign Statement* (Form 461) (GC §84203.5).

b) Late independent expenditures, defined in GC §84204 as "any independent expenditure which totals in the aggregate one thousand dollars ($1,000) or more and is made for or against any specific candidate or measure involved in an election before the date of the election but after the closing date of the last campaign statement required to be filed prior to the election by a candidate or committee participating in such election," must be reported within 24 hours of the time it is made (GC §84204). This is to prevent last minute, non-reported expenditures such as "hit-piece" mailers.

V. Limitations on Contributions/Expenditures

A. Written requirement for funds over $100

It is a violation of GC §84300 to make or receive any campaign contribution of $100 or more in cash, or to make any expenditure of $100 or more in cash. Any campaign contribution of $100 or more must be made by written instrument containing the name of the donor and the name of the payee.

B. Source of funds must be identifiable

So that the true source of all campaign contributions can be accurately identified and reported, no contribution can be made in the name of anyone other than the actual source (GC §§84301 and 84302).

a) A contribution made in the name of someone other than the actual source of the funds is referred to as **"campaign money laundering."** A common scenario involves the **"bundling"** of contribution checks from several employees of the same company, with the employees being reimbursed by the owner of the company.

   1) "Bundling" is a term which describes a fund raiser collecting checks from several contributors and delivering them to the candidate or committee all at once. The obvious motive behind bundling is the bundler establishing himself as a major fund raiser worthy of consideration from the candidate once he or she is elected into office.

   2) Bundling is not illegal as long as the contributors are making contributions in their own names, with their own funds and are not being reimbursed by the bundler.

b) For obvious reasons, anonymous contributions of $100 or more are prohibited (GC §84304).

C. Limits for appointed officers

Appointed officers of public agencies cannot solicit or accept a campaign contribution of more than $250 from any party while a proceeding involving that party is pending before the agency and for three months following the final decision of the agency.

The term "proceeding" means any application or hearing for a license, permit, entitlement for use, franchise or contract (other than competitively bid, labor, or personal employment contracts).

Appointed officers are also prohibited from soliciting contributions for other public officers or candidates. Any contribution must be disclosed on the record prior to the agency making any decision and the officer is prohibited from voting or influencing any such decision. This prohibition does not apply to elected officials. (GC §84308; 2 CCR 18438.1 through 18438.8).

D. Solicitation and use of public moneys is prohibited

A candidate cannot accept **public moneys** for the purpose of seeking office and a public officer cannot expend public moneys for the purpose of seeking public office (GC §85300).

E. Prohibition on soliciting from local agency employees

Although not part of the PRA, Government Code §3205 prohibits an officer, employee or candidate for elected office of a local agency from knowingly soliciting **political contributions from an employee** of that agency. A violation of section 3205 is a misdemeanor. It is not a violation if the solicitation is made to a significant segment of the public which may also include employees of the agency.

F. Funds in campaign accounts are held in trust

All campaign contributions deposited into the campaign account are deemed to be held in trust and to be used only for expenses associated with the election of the candidate to the specific office stated on the candidate's Form 501 (GC §89510).

For an expense by a candidate for elected office to be in the lawful execution of the trust, it must be "**reasonably related to a political purpose**." Expenses by office holders must be "**reasonably related to a legislative or governmental purpose**." Expenditures which confer a *substantial personal benefit* must be **directly related** to a political, legislative, or governmental purpose. (GC §89512).

G. Authorized expenses

Government Code sections 89512 and 89513 list those expenses which can be lawfully paid through the use of campaign funds. However, candidates and office holders who expend campaign funds for a purpose which violates those sections **cannot be criminally prosecuted**. (GC §89520). As a result, PID prosecutors have no authority to prosecute allegations that a candidate or office holder misused campaign funds for a purpose not authorized by the statutes. Regardless, the expenses authorized are listed below:

1. Travel and accommodation expenses

Travel and accommodation expenses of a candidate, elected officer, or anyone with authority to approve the expenditure of campaign funds, can only be paid with campaign contributions when the expense is necessary and directly related to a political, legislative, or governmental purpose (GC §89513(a)).

Payments or reimbursements for travel and necessary accommodations are considered to be directly related to a political, legislative, or governmental purpose if the payments would meet standards similar to the standards of the Internal Revenue Service pursuant to Sections 162 and 274 of the Internal Revenue Code for deductions of travel expenses under the federal income tax law (GC §89513(a)(1)).

2. Attorney fees

Campaign funds can only be used to pay attorney's fees or litigations costs when the litigation is "directly related to activities of a committee that are consistent with its primary objectives or arises directly out of a committee's activities or out of a candidate's or elected officer's activities, duties, or status as a candidate or elected officer" (GC §89514).

For example, campaign funds can be used to defend an action brought for a violation of a state or local campaign disclosure statute or to pay for a recount or election challenge.

3. Other legal fees

The use of campaign funds to pay fines, penalties, judgments and settlements is authorized to the same extent that the payment of attorney's fees is authorized. Campaign related parking citations may be paid with campaign funds (GC §89513(c)).

4. Formal clothing

Business or casual clothing cannot be purchased with campaign funds. Formal wear worn by the candidate or elected officer for a political, legislative or governmental purpose can be purchased with campaign funds (GC §89513(d)).

5. Tickets for political fundraisers

Tickets for the candidate, elected officer or staff to attend political fundraisers are allowable but tickets for sporting events or other

entertainment are only allowable if directly related to a political, legislative or governmental purpose (GC §89513(e)).

6. Charitable contributions

Campaign funds may be used to make donations or loans to charitable, educational, civic, religious, or similar nonprofit organizations (GC §89515).

7. Vehicle purchase or lease

Campaign funds may be used to purchase or lease a vehicle if title is taken in the name of the committee, not the candidate, and the use of the vehicle is directly related to a political, legislative, or governmental purpose. Vehicle operating costs may also be reimbursed through the use of campaign funds if the same criteria are met. (GC §89516).

8. Lease of real property

Campaign funds may not be used to lease real property or for the purchase, lease, or refurbishment of any appliance or equipment, where the lessee is a candidate, elected officer, campaign treasurer, or any individual with authority to approve the expenditure of campaign funds. Real property can be *leased* in the name of the committee. Campaign funds may not be used to *purchase* real property. (GC §89517).

H. Unauthorized expenses

Campaign funds cannot be used to pay **health care expenses** for a candidate, office holder or anyone with authority to approve the expenditure of campaign funds (GC §89513(b)(3)).

APPENDIX A

Political Reform Act
Statutes of Interest

§ 82006	Campaign statement defined
§ 82007	Candidate defined
§ 82013	Committee defined
§ 82015	Contribution defined
§ 82016	Controlled committee defined
§ 82025	Expenditure defined
§ 82031	Independent expenditure defined
§ 82036.5	Late independent expenditure defined
§ 82048.3	Slate mailer defined
§ 82048.4	Slate mailer organization defined
§ 83114	Requests for FPPC opinions and written advice
§ 84100	Committee treasurer requirement
§ 84101	Committee statement of organization requirement
§ 84200	Time for filing campaign statements
§ 84200.5	Pre-election campaign statement requirement
§ 84200.6	Special statements and reports
§ 84200.7	Time for filing pre-election statements
§ 84200.8	Time for filing pre-election statements
§ 84203.5	Independent expenditure reports
§ 84204	Late independent expenditure reports
§ 84215	Place of filing reports
§ 84216	Loans received by a candidate or committee
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§ 84218	Slate mailer campaign statements requirement

§ 84300	Limitation on cash contributions or expenditures
§ 84301	Contributions under true name requirement
§ 84302	Contributions by intermediary or agent prohibition
§ 84304	Anonymous contributions prohibition
§ 84307	Commingling of contributions prohibition
§ 84308	Contributions from persons with pending applications
§ 85200	Statement of intention requirement
§ 85201	Establishment of contribution account requirement
§ 85300	Use of public moneys prohibition
§ 85304	Transfer of contributions rules
§ 89510	Contributions are held in trust
§ 89512	Limitations on expenditures
§ 89513	Use of campaign funds for expenses
§ 89514	Use of campaign funds for attorney's fees
§ 89515	Use of campaign funds for charitable donations
§ 89516	Use of campaign funds for vehicle expenses
§ 89517	Use of campaign funds for real property
§ 89520	Violation of chapter; remedies
§ 91000	Punishment and statute of limitations for violations
§ 91001	Authority

Chapter 9

POLITICAL MAILERS, PHONE CALLS AND CAMPAIGN ADVERTISEMENTS

I. Mailers

As each election day approaches, public integrity prosecutors receive numerous complaints from candidates who are the targets of "hit piece" mailers or misleading phone calls. These mailers arrive in voters' mailboxes in the days or weeks prior to the election, are always negative and often contain outrageous allegations, half-truths and/or blatant lies about one or more candidates. The mailers either fail to disclose the candidate or committee responsible for creating the mailer, or include the identifying information of a non-existent entity. The phone calls, which are also anonymous, are usually recordings made by a phone bank the night before election day.

Because of First Amendment issues there are very few statutory limitations on the actual content of political mailers. Most inaccurate, misleading or even libelous statements in political mailers do not violate any criminal statute *per se*. Of course, the target of any libelous campaign mailer always has the option of a civil remedy, but there are no longer any criminal libel statutes in California.

There are, however, a few criminal statutes that are available to prosecute those who create and distribute these mailers or pay for anonymous phone calls. These statutes are discussed below. This list is by no means all-inclusive and creative prosecutors may be able to develop additional theories of liability based upon specific facts presented.

Some of the code sections that can be used to prosecute those responsible for illegal "hit piece" mailers are also applicable to those who actually create the mailers, such as the printer or graphic artist. As some printing houses specialize in creating these types of campaign mailers, consideration should be given to including them as defendants in any prosecution, assuming the evidence is sufficient.

II. Technical Requirements

There are a few technical statutory requirements which, if not complied with, can result in criminal prosecution.

Elections Code (E.C.) §18303 states that every candidate or committee that violates the mass mailing requirements of Government Code (GC) §84305 can

be prosecuted for a misdemeanor pursuant to the provisions of §91000 of the Political Reform Act (PRA). The Political Reform Act provides for penalties of up to six months in the county jail and a fine of up to $10,000. The statute of limitations for PRA misdemeanors is four years from the date of the violation.

A. Mass Mailing

The term mass mailing is defined in G.C. §82041.5 as over 200 substantially similar pieces of mail. Once the 200 piece threshold is reached, G.C. §84305 requires the name and address of the candidate or committee to appear on the outside of each piece of mail in the mass mailing and on at least one of the inserts included within each piece of mail.

It should be noted that there is no such requirement for mailings of 200 pieces or less, nor is there any return address requirement when the mailings are produced and sent by one who is not a candidate or committee. Because of First Amendment considerations, persons uninvolved in the campaign may send anonymous mailers. If it can be established that the sender is working on behalf of a candidate or committee then the requirements of G.C. §84305 would be applicable.

It should be noted that G.C. §82013 defines a committee as any person or combination of persons who directly or indirectly receives contributions of $1,000 or more, makes independent expenditures of $1,000 or more in a calendar year, or makes contributions totaling $10,000 or more in a calendar year to or at the behest of a candidate or committee. Therefore, if a political mailer costs $1,000 or more to create and mail, the sender is a committee and subject to the requirements of G.C. §84305.

B. Phone calls

Government Code §84310 requires that any candidate, committee or slate mailer organization that pays for 500 or more telephone calls that are similar in nature and that support or oppose a candidate or ballot measure, disclose the identity of the person or organization paying for the call. The statute is meant to apply to recorded phone calls and does not apply to phone calls made by a candidate or campaign volunteers.

Subsection (c) requires any candidate, committee, or slate mailer organization that pays for mass phone calls to maintain a record of the script used and a copy of the recording.

Since section 84310 is part of the Political Reform Act, a violation is a misdemeanor.

C. Mass Mailer at Public Expense

Government Code §89001 prohibits the sending of newsletters or mass mailings at public expense. A mailing is prohibited by 89001 if all the following elements are met:

a) The item must be delivered to the recipient at his home, business or P.O. box

b) The newsletter or mailer must feature an elected officer of the agency sending the mailer or include the name, office, photograph or other reference to an elected officer and be prepared or sent in cooperation with the elected officer.

c) Either *any* of the costs of distribution are paid for with public money or over $50 of the design, production or printing are paid with public money and the design, production, or printing is done with intent of sending the item.

d) More than 200 substantially similar items are sent in a single calendar month. (2 CCR 18901).

- There are 11 exceptions listed in California Code of Regulations §18901(b). Please review the regulation when analyzing whether a newsletter or mailer violates G.C. §89001. For example, newsletters sent by the agency to its employees do not violate the statute.

- Because section 89001 is part of the Political Reform Act, a violation constitutes a misdemeanor. But, since an expenditure of public funds for a mass mailer in violation of 89001 would be "without authority of law" it would also constitute a felony violation of Penal Code §424.

III. Political Advertisement

Political advertisements must contain certain disclosures, similar to the type of information required to appear on campaign mailers. The purpose of the statutes is to provide the potential voter with information as to the source of the funds paying for the ads. The disclosure requirements differ depending upon the type of advertisement and the entity paying for the advertisement. When conducting an analysis, consider:

a) Whether the advertisement is print or broadcast

b) Whether it is supporting or opposing a candidate or a ballot measure

c) Whether the entity paying for the advertisement is a candidate, committee or whether it results from an independent expenditure

A. Advertisement defined

Disclosure in political advertisements is covered in Government Code sections 84501, et seq. Section 84501 defines an advertisement as "any general or public advertisement which is authorized and paid for by a person or committee for the purpose of supporting or opposing a candidate for elective office or a ballot measure or ballot measures." California Code of Regulations §18450.1 more specifically describes what would constitute an advertisement. Included in the definitions in 18450.1 are billboards, television and radio ads, posters, door hangers, yard signs, telephone messages, and newspaper and magazine ads

Subsection (b) excludes from that definition communications from an organization to its members (i.e., union newsletters). Code of Regulation section 18450.1 specifically excludes internet-based communications, small promotional items, wearing apparel and skywriting.

B. Disclosure Requirements

All advertisements supporting or opposing a ballot measure must contain a disclosure statement identifying any person whose cumulative contributions to the committee paying for the ad are $50,000 or more. If there are more than two qualifying contributors, only the top two must be disclosed. (G.C. 84503) "Cumulative contribution" means the total amount received from the donor beginning 12 months prior to the date the committee made it first expenditure to quality, support of oppose the ballot measure, and ending within seven days of the ad being sent to the printer or broadcaster. (G.C. 84502)

All committees that support or oppose a ballot measure must identify themselves in print and broadcast ads, and must include a name or phrase that clearly identifies the special interest of its major donors of $50,000 or more. If a candidate, or a controlled committee, contributes $50,000 or more, the candidate or committee must be identified in the ad. (G.C. 84504)

Committees supporting or opposing ballot measures are prohibited from creating or using a non-candidate controlled committee to in avoid the disclosure of any individual, industry or committee as a major funding source. (G.C. 84505)

If a broadcast or mass mailing advertisement supporting or opposing a candidate or ballot measure is paid for by an independent expenditure, it must include a disclosure statement identifying both the name of the

committee making the expenditure and the names of any persons from whom the committee has received its two highest cumulative contributions of $50,000 or more during the 12 months preceding the expenditure. (G.C. 84506)

Disclosures in print advertising must be printed clearly and conspicuously in 10-point type. If the ad is broadcast, the information must be clearly audible. (G.C. 84507)

If a committee expends $5,000 or more to pay for a spokesperson in an advertisement in support or opposition of a ballot measure, the committee must file a report within 10 days of the expenditure identifying the measure, the spokesperson and disclosing the amount paid. The advertisement must include a statement that the spokesperson is being paid for his or her appearance. (G.C. 84511)

IV. Additional Issues

Additional statutes that can be used to prosecute those who send out illegal mailers or create illegal political ads are included below. Some of the statutes involve technical violations that should only be used against those who are sending out "hit piece" mailers or those who are intentionally attempting to mislead voters. Obviously, discretion is required when reviewing these types of cases and care should be taken to differentiate between those who are intentionally attempting to unfairly smear their opponents and those who have acted in good faith. Purely technical violations should be referred to the Fair Political Practices Commission for administrative review.

In addition to the sections listed below, some cities may have municipal code sections regulating the content of political advertisements. Some cities have ordinances prohibiting the unauthorized use of the city seal. A good practice would be to communicate with the local city attorney during any review of a complaint involving "hit piece" mailers.

A. Cash payments

Since most people who publish hit-piece mailers or misleading political advertisements attempt to remain anonymous, they often pay all or part of the expenses in cash. The cash payment will be made to the publisher or to the mailing house. Making a campaign expenditure of $100 or more in cash is a misdemeanor violation of G.C. §84300. Additionally, G.C. §84303 prohibits any campaign expenditure to be made by an agent or independent contractor on behalf of a candidate or committee unless it is reported.

B. Unauthorized use of a signature

Penal Code §115.1 is a wobbler which prohibits the use, with the intent to deceive, of any unauthorized signature in a published campaign advertisement. This section applies to mass mailings as defined in GC 82041.5, an outdoor ad, a paid television or newspaper ad, or any printed matter the expenditure for which would be required to be reported pursuant to the PRA. Prosecution under this section should be considered when the mailer contains an unauthorized endorsement which includes the name or signature of the purported endorser. An example would be the use of the unauthorized use of the signature of an incumbent public official. There may also be situations in which the proponent of the mailer unlawfully uses the signature of the candidate targeted in the mailer.

The statute broadly defines the term "signature" to include a handwritten or mechanical signature, or a copy thereof, as well as any printed or typewritten representation of a person's name.

C. Misuse of official documents

Penal Code §115.2 prohibits the use of false representations of official public documents in campaign advertisements. The definition of what constitutes a campaign advertisement is identical to that found in PC 115.1. A violation of 115.2 is a misdemeanor punishable by six months in the county jail and/or a $50,000 fine. Prosecution under this section should be particularly be considered when the mailers contain depictions of official documents attempting to deceive voters into believing the target of the "hit piece" has committed a crime or been found at fault in some administrative hearing. Examples include FPPC and court judgments, prosecuting agency charging documents, police reports or citations.

D. Use of a simulated ballot

Elections Code §18301 and §18400 prohibit the creation or use of a simulated or imitation ballot or ballot card. A violation of §18400 is a felony punishable by a sentence of up to three years in state prison, while a violation of §18301 is a misdemeanor. These sections should be considered in cases where the mailer depicts a copy of an actual, simulated or imitation ballot. "Hit piece" mailers depicting ballots have been used to deceive voters into believing certain candidates' names have been officially stricken from the ballot.

E. Misleading voters regarding incumbency

Elections Code §18350 prohibits a candidate from misleading voters during a campaign by pretending or implying that the candidate is an

incumbent or acting in the capacity of a public officer. A violation of §18350 is punishable as a misdemeanor.

F. Reproduction of county of local agency seal

The use of a reproduction or facsimile of the seal of a county or other local government agency in campaign literature or a mass mailing with the intent to deceive voters constitutes a misdemeanor in violation of E.C. §18304. Pursuant to subsection (c) "local government agency" means school district, special district, or any other board, commission or agency of local jurisdiction.

The use of the seal in a manner that creates a false impression that the document is authorized by the agency is evidence of an intent to deceive. (E.C. 18304(b))

G. Reproduction of city seal in campaign literature

The use of a reproduction of a city seal in any campaign literature or mass mailing with the intent to deceive voters is a misdemeanor in violation of G.C. §34501.5. The use of the seal in a manner that creates a false impression that the document is authorized by the agency is evidence of an intent to deceive. (G.C. 34501.5(b))

H. Use of a counterfeit public or corporate seal

Penal Code §472 prohibits the use of a counterfeit public or corporate seal with the intent to defraud. A violation is punishable as a wobbler pursuant to Penal Code §473. This section should be considered, in conjunction with Penal Code §115.2, when counterfeit public documents are portrayed in campaign mailers with the intent to deceive voters. Those who create "hit piece" mailers will sometimes include copies of official seals to lead voters to believe the target of the mailer has been sued, criminally prosecuted or been the respondent in an administrative action.

I. Prohibitions against police officers depicted in uniform

Although there is no state criminal statute prohibiting the use of uniformed police officers in political mailers G.C. §3206 prohibits officers or employees of a local agency from participating in political activities of any kind while in uniform. Some cities have local ordinances prohibiting the use of their city emblems and/or police badges in campaign advertisements. If a conspiracy can be proved, violation of the local ordinance can result in a felony prosecution.

V. Investigative Considerations

Most campaign mailers are sent bulk mail and will include the permit number on the mailer or envelope. As a result, the bulk mail house is a logical starting point in any political mailer investigation. Since there is no legal privilege to the information regarding who delivered the mailers to the mailing house and who is paying the postage, many times the mail house will provide this information to the investigator without the need for a warrant or subpoena. If the mail house refuses to cooperate, the information can be obtained by way of grand jury subpoena or search warrant.

As the mailer in question may have to be proved to be a "mass mailing" of 200 pieces or more, evidence from the mailing house as to the total number mailed must be obtained. These records may be provided voluntarily or may require subpoena or a search warrant.

Since only candidates or committees are required to include return addresses on political mailers, establishing the entity responsible for the mailer as a candidate or committee may be necessary. Grand jury subpoenas or search warrants tracing the funds from the mailing house to the source are tools that can be utilized for this purpose. If the cost of mailing the pieces exceeds $1,000 then, by definition, the sender is a committee and must include their identity on each piece.

If the printer or graphic artist responsible for creating the political mailer can be identified, a search warrant seeking the original document, or the art and copy relating to the document would be appropriate. The warrant should seek the seizure (or duplication) of any computers used to create documents as well as any printing plates. The printer need not be a suspect in order for us to search his/her business.

In cases alleging the unauthorized use of a signature, official document or official seal, witnesses will be needed to testify that the use was unauthorized.

VI. Relevant Code Sections

A. Elections Code §18303

Every person who violates Section 84305 of the Government Code relating to *mass mailing* is subject to the penal provisions set forth in Chapter 11 (commencing with Section 91000) of Title 9 of the Government Code.

B. Government Code § 82041.5

"Mass mailing" means over two hundred substantially similar pieces of mail, but does not include a form letter or other mail which is sent in response to an unsolicited request, letter or other inquiry.

C. Government Code § 84305

(a) Except as provided in subdivision (b), no candidate or committee shall send a mass mailing unless the name, street address, and city of the candidate or committee are shown on the outside of each piece of mail in the mass mailing and on at least one of the inserts included within each piece of mail of the mailing in no less than 6-point type which shall be in a color or print which contrasts with the background so as to be easily legible. A post office box may be stated in lieu of a street address if the organization's address is a matter of public record with the Secretary of State.

(b) If the sender of the mass mailing is a single candidate or committee, the name, street address, and city of the candidate or committee need only be shown on the outside of each piece of mail.

(c) If the sender of a mass mailing is a controlled committee, the name of the person controlling the committee shall be included in addition to the information required by subdivision (a).

D. Government Code §84310

(a) A candidate, committee, or slate mailer organization may not expend campaign funds, directly or indirectly, to pay for telephone calls that are similar in nature and aggregate 500 or more in number, made by an individual, or individuals, or by electronic means and that advocate support of, or opposition to, a candidate, ballot measure, or both, unless during the course of each call the name of the organization that authorized or paid for the call is disclosed to the recipient of the call. Unless the organization that authorized the call and in whose name it is placed has filing obligations under this title, and the name announced in the call either is the full name by which the organization or individual is identified in any statement or report required to be filed under this title or is the name by which the organization or individual is commonly known, the candidate, committee, or slate mailer organization that paid for the call shall be disclosed. This section shall not apply to telephone calls made by the candidate, the campaign manager, or individuals who are volunteers.

(b) Campaign and ballot measure committees are prohibited from contracting with any phone bank vendor that does not disclose the information required to be disclosed by subdivision (a).

(c) A candidate, committee, or slate mailer organization that pays for telephone calls as described in subdivision (a) shall maintain a record of the script of the call for the period of time set forth in Section 84104. If any

of the calls qualifying under subdivision (a) were recorded messages, a copy of the recording shall be maintained for that period.

E. Government Code § 84501

(a) "Advertisement" means any general or public advertisement which is authorized and paid for by a person or committee for the purpose of supporting or opposing a candidate for elective office or a ballot measure or ballot measures.

(b) "Advertisement" does not include a communication from an organization other than a political party to its members, a campaign button smaller than 10 inches in diameter, a bumper sticker smaller than 60 square inches, or other advertisement as determined by regulations of the commission.

F. California Code of Regulations §18450.1

(a) An advertisement as defined in Government Code section 84501 includes but is not limited to the following:

(1) Programming received by a television or radio;

(2) A communication as described in subdivision (a) of Government Code section 84501 that is placed in broadcast, print or electronic media.

(A) An electronic media advertisement means and advertisement, logo, icon, writing, image, recording, or other data transmitted, distributed, posted, broadcast, or displayed electronically. This includes, but is not limited to advertisements in electronic messages, electronic message attachments, text messages, or advertisements that appear on Internet webpages, blogs, mobile devices, or other electronic communication systems.

(3) A telephone or facsimile message that is not solicited by the recipient and is intended for delivery in substantially similar form to 200 or more households. For purposes of this paragraph, when a committee sends a message to 200 or fewer recipients and the message is "forwarded" to other persons by a recipient, the message sent by the committee is not an advertisement by that committee unless the recipient forwarded the message at the behest of the committee and more that 200 total recipients received the message.

(4) A direct mailing that is not solicited by the recipient and is intended for delivery in substantially similar form to 200 recipients;

(5) Posters, door hangers, and yard signs produced in quantities of more than 200;

(6) A billboard;

(7) Campaign buttons 10 inches in diameter or larger, and bumper stickers 60 square inches or larger produced in quantities of more than 200.

(b) In addition to the exempted communications in subdivision (b) of Government Code section 84501, none of the following is an "advertisement":

(1) A small promotional item (e.g., pen, pin, etc.) upon which the disclosures required by Government Code sections 84503, 84506 and 84507 cannot be conveniently printed or displayed, wearing apparel, and skywriting;

(2) A communication from an organization to its members, other than a communication from a political party to its members;

(3) An electronic media advertisement where inclusion of any of the disclosure requirements of Sections 84503, 84504, 84506, 84506.5 or of Regulation 18450.4(b)(3)(G)(iv) would be impracticable because:

(A) The nature of the technology used in conveying the disclosure makes it impossible to incorporate the disclosures, and

(B) The inclusion of the disclosures would severely interfere with the committee's ability to convey the intended message so that it can be understood by the audience. Any committee that claims a required disclosure in an electronic media advertisement is impracticable has the burden of establishing that a disclaimer could not be included due to the above factors.

G. Penal Code § 115.1

§ 115.1. Legislative findings and declarations; Publication of deceptive campaign advertisement containing unauthorized signature; "Campaign advertisement"; Punishment

(a) The Legislature finds and declares that the voters of California are entitled to accurate representations in materials that are directed to them in efforts to influence how they vote.

(b) No person shall publish or cause to be published, with intent to deceive, any campaign advertisement containing a signature that the person knows to be unauthorized.

(c) For purposes of this section, "campaign advertisement" means any communication directed to voters by means of a mass mailing as defined in Section 82041.5 of the Government Code, a paid television, radio, or newspaper advertisement, an outdoor advertisement, or any other printed matter, if the expenditures for that communication are required to be reported by Chapter 4 (commencing with Section 84100) of Title 9 of the Government Code.

(d) For purposes of this section, an authorization to use a signature shall be oral or written.

(e) Nothing in this section shall be construed to prohibit a person from publishing or causing to be published a reproduction of all or part of a document containing an actual or authorized signature, provided that the signature so reproduced shall not, with the intent to deceive, be incorporated into another document in a manner that falsely suggests that the person whose signature is reproduced has signed the other document.

(f) Any knowing or willful violation of this section is a public offense punishable by imprisonment in a county jail not exceeding 6 months, or pursuant to subdivision (h) of Section 1170, or by a fine not to exceed fifty thousand ($50,000), or by both that fine and imprisonment.

(g) As used in this section, "signature" means either of the following:

(1) A handwritten or mechanical signature, or a copy thereof.

(2) Any representation of a person's name, including, but not limited to, a printed or typewritten representation, that serves the same purpose as a handwritten or mechanical signature.

H. Penal Code § 115.2

(a) No person shall publish or cause to be published, with actual knowledge, and intent to deceive, any campaign advertisement containing false or fraudulent depictions, or false or fraudulent representations, of official public documents or purported official public documents.

(b) For purposes of this section, "campaign advertisement" means any communication directed to voters by means of a mass mailing as defined in Section 82041.5 of the Government Code, a paid newspaper advertisement, an outdoor advertisement, or any other printed matter, if the expenditures for that communication are required to be reported by

Chapter 4 (commencing with Section 84100) of Title 9 of the Government Code.

(c) Any violation of this section is a misdemeanor punishable by imprisonment in the county jail, or by a fine not to exceed fifty thousand dollars ($ 50,000), or both.

I. Penal Code § 472

Every person who, with intent to defraud another, forges, or counterfeits the seal of this state, the seal of any public officer authorized by law, the seal of any court of record, or the seal of any corporation, or any other public seal authorized or recognized by the laws of this state, or of any other state, government, or country, or who falsely makes, forges, or counterfeits any impression purporting to be an impression of any such seal, or who has in his possession any such counterfeited seal or impression thereof, knowing it to be counterfeited, and willfully conceals the same, is guilty of forgery.

J. Elections Code § 18400

Any person who makes, uses, keeps, or furnishes to others, any paper or cards watermarked or overprinted in imitation of ballot paper or ballot cards is punishable by a fine not exceeding one thousand dollars ($ 1,000), or by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for 16 months, two or three years, or by both that fine and imprisonment.

K. Elections Code § 18350

Every person is guilty of a misdemeanor who, with intent to mislead the voters in connection with his or her campaign for nomination or election to a public office or in connection with the campaign of another person for nomination or election to a public office, does either of the following acts:

(a) Assume, pretend, or imply, by his or her statements or conduct, that he or she is the incumbent of a public office when that is not the case.

(b) Assume, pretend, or imply, by his or her statements or conduct, that he or she is or has been acting in the capacity of a public officer when that is not the case.

Any violation of this section may be enjoined in a civil action brought by any candidate for the public office involved.

Chapter 10

GIFTS TO PUBLIC OFFICERS

I. Introduction

There is no prohibition against public officers or employees accepting gifts from outside sources. However, depending on the status of the officer or employee, there may be certain rules, restrictions, limitations and reporting requirements regarding the gifts that officers and employees receive from a single source during a 12 month period. The areas of concern are: limitations on the value of gifts that can be received from a single source, reporting requirements for gifts over a specified value, and conflict of interest prohibitions against taking official action which benefits a source of gifts.

II. Definitions

A. What is a gift

"Gifts" are defined in Government Code §82028 as: any payment that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status. Therefore, any financial benefit that the officer receives as a result of his official position, that is not available to a member of the general public, is considered a gift.

B. When is the gift "received"

A gift is "received" or "accepted" when the recipient knows that he or she has either actual possession of the gift or takes any action exercising direction or control over the gift. In the case of a rebate or discount not available to the general public, the gift is received when the recipient knows that the discount is not available to the general public. Discarding or transferring the gift to another person does relieve the officer of the limitations of G.C. 89503. (2 CCR 18941)

C. What is the value of the gift

For reporting and disqualification purposes, the value of the gift is the fair market value on the date the gift is either received or promised. (2 CCR 18946(a)) If the gift is unusual or unique the value is the cost to the donor, if that cost is known or ascertainable. (2 CCR 18946(b)) If the cost to the donor is not ascertainable, the recipient can make a good faith effort to

value the gift based on the price of similar items. If no similar items exist, the recipient is not required to have the item appraised but may make a reasonable estimate based on a good faith effort. (2 CCR 18946(b))

1. Complimentary passes or tickets

The value of complimentary passes or tickets is the fair market value. The fair market value is the value that the gift would command in the open market. (*Kaiser Co. v. Reid* (1947) 30 C2d 610).

a) If a pass or ticket similar to the one received by the officer is sold on the open market to the general public, the fair market value is that sales price. If the complimentary ticket or free pass cannot be purchased by the general public then the following factors should be taken into account when establishing a fair market value:

   1) What is the maximum use a person might reasonably make of such a pass in a year, taking into account the nature of the event and whether the pass is transferable; and

   2) What is a reasonable percentage that a vendor might discount the price of a pass from the price of multiple individual tickets in order to induce the general public to buy a pass. (*Hopkins, William P., City Attorney, Anaheim* 3 FPPC 107 (No. 77-022, Dec. 8, 1977)).

b) For tickets or passes that can be used for repeated admissions or access to facilities the value is the fair market value of the actual use of the ticket or pass by the official plus his guests, plus the fair market value of use by persons to whom the ticket or pass is transferred by the official. (2 CCR 18946.1(b)).

2. Wedding gifts

Unless a wedding gift is intended solely for the use and enjoyment of one spouse over the other, an official is required to report one-half the value of any wedding gifts received by him and his spouse. (2 CCR 18946.3)

D. Who makes the gift

The general rule is that anyone who is not an intermediary, who makes a gift to an official, is considered to be the source of the gift for purposes of valuation and reporting. (2 CCR 18945(a)). A source of a gift who makes payment to a third party intermediary to actually deliver a gift to the official is still considered to be the source if he directs and controls the payment to the intermediary. (2 CCR 18945(a)).

a) For purposes of reporting, an official may presume that the person who actually delivers the gift is the source of the gift unless: the person delivering the gift discloses the actual source or it is clear from the surrounding circumstances that the person delivering the gift is not the actual source.

b) There are rules for determining whether gifts from multiple entities are from a "single source" for purposes of reporting.

1) Gifts received from an individual donor and from a business entity in which the donor has an interest of more than 50%, or where the individual directs and controls the decisions of the business entity, are considered to be from a single source. (2 CCR 18945.1(a) and (b)).

2) Gifts received from two entities will be considered to be from a single source if the same person directs and controls the decisions of both entities. (2 CCR 18945.1(c)).

3) Also, gifts from two business entities with the same owner and gifts received from both a parent company and its subsidiary are considered to be from a single source. (2 CCR 18945.1(d)).

III. Gift Limitations

California Government Code §89503 prohibits specified individuals from accepting gifts from any single source totaling more than $440 in any calendar year. The gift amount is adjusted every two years by the F.P.P.C. (2 CCR 18940.2).

a) Those subject to the gift limitations are elected state officers and elected officers of local government agencies (G.C. 89503(a)), candidates for elective state office, elective office of a local government agency and judicial candidates (G.C. 89503(b)).

A person shall be deemed a candidate for purpose of the gift limitation upon filing a declaration of candidacy or a statement of organization as a committee for election to office, whichever occurs first (89503(b)).

b) Also subject to the gift limitations imposed by section 89503 are members of state boards or commissions and employees of state or local agencies that are required to file a Form 700 Statement of Economic Interest (89503(c)).

c) Sitting judges and part-time members of public college boards of trustees are exempt from the limitations imposed by section 89503 (G.C. 89503(d)).

d) Gifts to spouses and children of public officers are not subject to the gift limitation unless the officer enjoys a direct benefit of the gift to the same extent as the spouse or child. (*Cory, Ken, State Controller* 1 FPPC 153 (No. 75-094-B, Oct. 23, 1975))

An officer who accepts gifts in excess of the limitations imposed by section 89503 is not subject to prosecution for a misdemeanor because criminal prosecution is prohibited pursuant to G.C. 89520.

IV. Reporting Requirements

Public officers designated under G.C. 87200 to file a Statement of Economic Interest must report any gift in an amount over $50 from a single source on their annual Form 700. (G.C. §§87202, 87203, 87207). A knowing or willful failure to file a Form 700 as required, or a knowing or willful failure to include a gift over $50 on the form, can be prosecuted as a misdemeanor.

Since the Form 700 is filed under penalty of perjury, a failure to include a gift over $50 could also be filed as a felony. However, in considering a perjury prosecution for the failure to report a gift in a Statement of Economic Interest, refer to the definition of materiality as stated by the California Supreme Court in *People v. Hedgecock* (1990) 51 Cal 3d 395 at 406:

"We therefore conclude that, in a perjury prosecution based on a failure to comply with the disclosure provisions of the Act, an omission or misstatement of fact is material if there is a substantial likelihood that a reasonable person would consider it important in evaluating (1) whether a candidate should be elected to, or retained in, public office, or (2) whether a public official can perform the duties of office free from any bias caused by concern for the financial interests of the official or the official's supporters."

V. Conflict of Interest Prohibitions

A public officer cannot take official action or make an official decision affecting the donor of a gift in excess of $440 within 12 months prior to the receipt of the gift. (G.C. §§87100, 87103) A knowing or willful violation of section 87100 constitutes a misdemeanor. If the official decision affects a contract between the official's agency and the donor of the gift there could be felony criminal liability pursuant to G.C. 1090/1097.

As noted above, an elected official, and any other public employee required to file a Form 700, is prohibited from accepting gifts in excess of $440 from a single source. If the elected official accepts the gift(s) and takes official action

affecting the donor, he is in violation of both sections 89503 and 87100 of the Government Code.

VI. Items Not Considered Gifts

A. Informational materials

Items, such as books, reports, pamphlets, admission to informational seminars or conferences, etc., which serve to convey information provided for the purpose of assisting the officer in the performance of his or her official duties. (G.C. 82028(b)(1); 2 CCR 18942.1)

On-site demonstration tours designed to assist the officer in the performance of his or her official duties are also excluded from the definition of a gift, but the payment for transportation to such a tour is considered a gift unless transportation to the location is not otherwise commercially available. (2 CCR 18942.1(c))

B. Unused or returned gifts

A gift that is returned, donated or reimbursed is not considered to be accepted by the officer. (2 CCR 18943(a)). To qualify as "returned" the gift must be returned to the donor, or the donor's intermediary, unused, within 30 days of the date of receipt. (G.C. 82028(b)(2)).

A gift that is donated, unused, to a charitable organization or a public agency within 30 days of the date of receipt without being claimed as a charitable contribution is not considered accepted by the officer and need not be disclosed. (2 CCR 18942(a)(2)).

Any reimbursement from the officer to the donor within 30 days of the date of the acceptance of the gift will reduce the value of the gift by the amount of the reimbursement. The amount not reimbursed must be reported and counts toward the $440 ceiling.

C. Gifts to the official's immediate family

The general rule is that a single gift given jointly to the official and his spouse or another member of his immediate family is considered a gift to the official and he must claim the full value of the gift. (2 CCR 18943(a)).

There are two exceptions to the rule: when the gift does not confer a personal benefit on the official, or when there was no intent on the part of the donor to confer a gift to the official (2 CCR 18943(c)).

a) In determining whether the joint gift will be considered a gift to the official, consider three factors:

1) whether the official enjoys any direct benefit from the gift,

2) whether he uses the gift (and the use is more than nominal or incidental), and

3) whether he exercises discretion and control over who will use the gift.

If any of those factors are present, the gift will be considered a gift to the official for the full value.

b) To determine the intent of the donor, consider the relationship of the donor to the spouse of other family member, the nature of the gift, and the manner in which the gift was delivered.

For example, if the donor has a social or professional relationship with the official's spouse, but does not know the official, a joint gift may not be attributable to the official. Additionally, if the gift is of the type that can only be enjoyed by the other family member, or was delivered in a manner which makes it clear that it was not intended to be a gift to the official, it would not have to be reported. (2 CCR 18943(c)).

D. Gifts from the official's family

Gifts from an individual's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first cousin or the spouse of any such person are not reportable unless the relative is acting as an intermediary for another source.

E. Wedding and holiday gifts

Wedding gifts and gifts exchanged between individuals on birthdays, holidays, and other similar occasions are not reportable if the gifts exchanged are not substantially disproportionate in value.

F. Tickets or passes

Pursuant to 2 CCR 18944.1, a ticket or pass means admission to a facility, event, show, or performance for entertainment, amusement or recreational purposes. The general rule is that a free ticket or pass provided to an official from a source other than his agency for an event at which the official will not be performing some role or function on behalf of the public agency will be considered a gift. (2 CCR 18944.1(a)).

a) If the ticket or pass is provided by the official's agency, there are situations in which the official would not have to report the ticket or pass as a gift. For example, the official and the agency can treat the ticket or pass as income to the official instead of a gift. If so, both the official and the agency would have to report the ticket or pass as such on tax documents. (2 CCR 18944.1(a)(1)).

b) Additionally, tickets or passes from on outside source that are distributed by the agency and are not earmarked by the original source for a specific official are not considered gifts if the agency determines, in accordance with a written policy, which official(s) may use the tickets or passes. (2 CCR 18944.1(b)(1)).

c) Tickets or passes received by the agency from an outside source and distributed to officials of the agency will not be considered gifts if they were:

   1) received by the agency as part of a contract for public property,

   2) received by the agency because the agency controls the event, or were purchased by the agency with public funds, and

   3) distributed to the official pursuant to a written policy. (2 CCR 18944.1(b)(2)).

d) The written policy must state the public purpose to be accomplished by the distribution of the tickets or passes and must provide that the official is not allowed to transfer the tickets or passes to anyone other than the official's immediate family. (2 CCR 18944.1(c)). This would apply to cities which host county fairs or other events which charge admission and take place on public property.

e) The information regarding a ticket or pass from an outside source that is provided to an official by the official's agency must be prominently posted on the agency's website within 30 days of distribution. The posting must include the name of the official, the date and description of the event, the number of tickets provided, the face value and a description of the public purpose served by distributing the tickets or passes to the official. (2 CCR 18944.1(d))

f) Any food or beverages received by the official from a third party at an event would not be subject to section 18944.1 and would have to be reported as gifts if applicable. (2 CCR 18944.1(f))

G. Agency raffles and gift exchanges

If an agency holds a raffle in which the prize has been contributed by an outside source without cost to the agency, the prize is considered a gift to the official or employee who wins and must be reported as such. The source of the gift is the outside agency with the agency being considered the intermediary. The value to be reported is the fair market value of the prize minus any money paid by the official or employee to participate in the raffle. (2 CCR 18944.2(b)(1)).

If the prize is purchased with public funds by the agency, the prize would also be considered a gift unless the purchase of the prize by the agency was a lawful expenditure of public funds. (2 CCR 18944.2(b)(2) and 2 CCR 18944.3). If an employee of the agency donates the prize to the agency, and the employee is not acting as an intermediary for a third party, the prize is not considered to be a gift to the official or employee who wins the prize. (2 CCR 18944.2(b)(3)).

Gifts exchanged by agency employees as part of a gift exchange are not reportable unless they are substantially disproportionate in value. (2 CCR 18944.2(c)).

H. Prizes and awards

Prizes or awards received in a bona fide competition, not related to the recipient's status as an official are not considered gifts and need not be reported. Any prize or award not fitting that description is a gift for reporting and disqualification purposes.

I. Travel

An official who gives a speech or participates in a panel at a seminar or other event does not have to report free admission to the event, refreshments, intrastate transportation or necessary lodging provided by the even sponsor as gifts. (2 CCR 18950.1)

Payment for travel and lodging will not be considered a gift or a prohibited honorarium, in violation of G.C. 89502, if:

1) Travel expenses are limited to the day before, the day of and the day after the speaking engagement, and the speech is reasonably related to a legislative or governmental purpose (2 CCR 18950.1(a)(2)); or

2) The travel and lodging is paid by a government or tax exempt non-profit agency and is reasonably related to a legislative or government purpose (2 CCR 18950.1(b)); or

3) The travel expenses are paid from campaign funds (2 CCR 18950.3); or

4) The travel expenses are paid by the official's agency (2 CCR 18950(c)(2))

J. Miscellaneous

Also not considered to be gifts or reporting or disqualification purposes are campaign contributions, inheritances and personalized plaques and trophies with an individual value of less than two hundred fifty dollars ($250).

Chapter 11

AGGRAVATED WHITE COLLAR CRIME ENHANCEMENT

I. Introduction

Penal Code §186.11, the "Aggravated White Collar Crime Enhancement" statute, should be considered in any case involving a loss of more than $100,000. In addition to establishing sentencing enhancements, the statute also provides a process by which the defendant's assets can be frozen and, at the time of sentencing, be liquidated to pay restitution and fines. The allegation must be charged in the pleading and admitted by the defendant or found to be true at trial in order for the enhancements to be imposed.

II. Elements

The statute applies in all cases in which a person:

1) Commits two or more related felonies;

2) A material element of which is fraud or embezzlement;

3) Which involve a pattern of related felony conduct; and

4) The pattern of related felony conduct involves the taking of more than $100,000, or results in the loss by another person or entity or more than $100,000.

A "pattern of related felony conduct" means engaging in at least two felonies that have the same or similar purpose, result, principals, victims or methods of commission, or are otherwise interrelated by distinguishing characteristics, and that are not isolated events.

"Two or more related felonies" means felonies committed against two or more separate victims, or against the same victim on two or more separate occasions. (PC §186.11(a)(1)).

III. Enhancement

a) If the pattern of felony conduct involves the taking of more than $500,000, the sentencing enhancement is an additional two, three or five years. Additionally, the defendant is liable for a fine of

$500,000 or double the value of the taking, whichever is greater. (PC §186.11(a)(2)).

b) If the pattern of felony conduct involves the taking of more than $100,000 but not more than $200,000, the sentencing enhancement is an additional one year. (PC §186.11(a)(3); PC §12022.6).

c) A taking of more than $200,000 but not more than $500,000, results in an enhancement of an additional two years. The defendant is also liable for a fine of $100,000 or double the value of the taking, whichever is greater. (PC §186.11(a)(3); PC §12022.6).

d) Since the defendant is statutorily responsible for making full restitution to the victim, the defendant's maximum financial liability, if the enhancement is found true, is equal to three times the amount of the loss to the victim (full restitution plus double the amount of the taking), subject to the maximums set forth in PC §186.11(c).

IV. Preservation of Assets

If the enhancement allegation has been alleged, the court may order any asset or property in control of the defendant, or any asset or property transferred by the defendant to a third party subsequent to the commission of the crime, preserved in order to pay future restitution and fines.

It should be noted that this is not limited only to assets acquired by the defendant through his or her illegal activities. Any assets or property in control of the defendant can be seized to satisfy future restitution and fines. If the defendant is convicted, the property may be sold to pay restitution and any fines imposed.

a) At the time of filing, or anytime thereafter, the prosecutor can file a petition with the court seeking a temporary restraining order, a preliminary injunction, the appointment of a receiver or any other protective order necessary to preserve the property or assets of the defendant. Additionally, the court can require the defendant to post a bond in an amount sufficient to satisfy any potential fines and restitution. (PC §186.11(d)(2); PC§186.11(e)(3)).

b) A temporary restraining order with a *lis pendens* is a common way that the Public Integrity Division freezes assets. A sample of a *lis pendens* is included at the end of this chapter in Appendix A. Samples of a petition for temporary restraining order (with

investigator's affidavit) are included in Appendices B and C. A sample notice is included in Appendix D.

In determining whether to make any such order, the court shall consider:

1) The public interest in preserving the property;

2) The difficulty of preserving the property;

3) The fact that the relief is being requested by a public prosecutor on behalf of an alleged victim;

4) The likelihood that substantial public harm has occurred; and

5) The significant public interest involved in compensating the victim. (PC§186.11(f)(3))

c) If the defendant has control of real property, the prosecutor can file a *lis pendens*. (PC §186.11(d)(4)).

d) If the defendant has control of a bank account, or other assets within a bank or other financial institution, the prosecutor can obtain an order from the court to the bank, ordering the bank to provide the prosecutor with all information necessary to identify the accounts.

The prosecutor may then obtain an order from the court requiring the bank or other financial institution to freeze the assets pending the outcome of the case. (PC §186.11(e)(5)).

e) In fashioning its orders, the court can consider the defendant's request that a portion of the property be released to the defendant so that he or she can pay reasonable legal fees and any necessary and appropriate living expenses. In deciding whether to release property, the court shall weigh the needs of the public to retain the property against the needs of the defendant. (PC §186.11(f)(4)).

f) The court shall seek to protect the interests of innocent third parties, including spouses of the defendant, when making its orders. (PC §186.11(f)(5)).

g) The court shall attempt to prevent any asset subject to its orders from perishing, wasting or being significantly reduced in value during the pendency of the case and may make any orders

necessary to preserving the continued viability of any business subject to court order. (PC §186.11(f)(8); PC §186.11(f)(9)).

If the property being maintained by court order is liable to perish, waste or significantly lose value, the court can order an interlocutory sale of the property upon a noticed motion brought by the appointed receiver. The court can also order such sale when the expenses of maintaining the property are disproportionate to the value of the property. (PC §186.11(f)(7)).

V. Notice Requirements

Property holds under the Aggravated White Collar Crime Enhancement are obtained pursuant to a petition. (PC §186.11(d)(2). The Penal Code requires notice of the petition. Notice is in two general categories and *both* are required.

A. Notice by personal service or registered mail

Under PC §186.11(d)(3), notice is required by "personal service or registered mail to every person who may have an interest in the property." Obviously, the defendant is a person who has an interest in the property and it is a recommended practice to execute personal service. Since PID will usually file the petition at the time of filing the criminal complaint, notice may be served at defendant's arraignment.

Others who have an interest in the property and thus are entitled to notice by personal service or registered mail include:

1) the spouse of the defendant,

2) individuals whose name is also on the account or property,

3) financial institutions that have the mortgage on real property, and

4) taxing agencies where the property is located.

The document served or mailed may be a copy of the actual temporary restraining order, preliminary injunction and *lis pendens*.

B. Notice by publication

Notice is also required by publication "for at least three successive weeks in a newspaper of general circulation in the county where the property ... is located." (*Id.*)

For property in Los Angeles County, the Los Angeles Daily Journal is the publication generally used. The Daily Journal also has an Orange County edition that can be used as well. Publications will naturally give a cost estimate and any billing may be handled as an expense request within the office.

The notice to be published by a newspaper is in the form of a typewritten legal notice which notes the criminal case and describes the property affected. It also includes information that a verified claim must be filed in court within 30 days, with a verified copy served on the District Attorney (attention to the deputy assigned to the case). An example of the newspaper notice is included at the end of this section.

C. Exception to notice requirements under §186.11

A prosecutor may obtain a temporary restraining order, ex parte, pending a hearing for a preliminary injunction. (PC §186.11(f)(1).) The issuance of such order may be based upon the sworn declaration of a peace officer with personal knowledge of the investigation, establishing probable cause to believe that the requisite white collar crime has taken place and that the amount of the potential fines and restitution exceeds or equals the amount of the assets subject to the temporary restraining order. (*Id.*)

Here, the temporary restraining order may be issued without notice upon a showing of good cause to the court. (*Id.*) Since a peace officer declaration would normally be required to obtain the temporary restraining order, the good cause statement should be included in the declaration itself.

Nonetheless, it should be noted that the temporary restraining order is in anticipation of a hearing for a preliminary injunction and the described notice requirements may apply to that preliminary injunction. (*Id.*)

VI. Claims

Once proper notice is made, there may be interested parties with a legitimate claim on all or a portion of the property subject to court order. Anyone claiming an interest in any of the property can file a claim with the court any time within 30 days of the date of publication or of receiving notice. A verified copy of the claim must also be filed with the prosecutor. (§186.11(e)(6)).

Within ten days of requesting a hearing, the defendant, or one who has filed a claim, has the right to an order to show cause hearing seeking relief, or

modification, from the any *lis pendens* or order of the court regarding the property. (PC§186.11(f)(2)).

VII. Post conviction

Once the defendant is convicted, and the enhancement found true, the trial judge will make a finding as to what portion of the assets under court order shall be sold to pay the fines and restitution. (PC §186.11(h)(1)(A)).

The court shall also order the defendant to pay full restitution to the victim (or order restitution based upon the defendant's ability to pay), and make the payment of restitution a condition of any probation granted. The judge may also order that the probation period continue up to 10 years or until full restitution is made to the victim. (PC §186.11(h)(1)(B)).

If the execution of judgment is stayed pending appeal, any orders affecting the property shall be maintained in full force and effect during the pendency of the appellate period. (PC §186.11(h)(1)(D)).

VIII. Liquidation of assets

When the receiver appointed by the court liquidates the assets subject to the court's orders, they shall be distributed in the following priority:

1) All reasonable expenses incurred by the receiver in connection with the sale of the property;

2) The holder of any valid lien, mortgage, or security interest;

3) Any victim, as restitution;

4) The payment of any fines imposed;

5) The restitution fund. (PC §186.11(i)).

If the sale of the assets is insufficient to pay all the restitution and fines, the court shall order an equitable sharing of the proceeds and specify the percentage of the proceeds allotted for each purpose. But, at least 70 percent of the proceeds remaining after the receiver's expenses and the lien holders have been paid, shall go for restitution. (PC §186.11(j)).

APPENDIX A

JACKIE LACEY [Phone number] District Attorney of Los Angeles County [DDA assigned to case] Deputy District Attorney [Street address] Los Angeles, CA 90012 Attorney for the People	FOR RECORDERS USE ONLY
SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF LOS ANGELES CLARA FOLTZ JUSTICE CENTER 210 West Temple Street Los Angeles, CA 90012	
The People of the State of California v. [Defendant's name]	
COURT ORDER/NOTICE OF PENDENCY (LIS PENDENS)	Case Number: [Number]

ORDER TO SHOW CAUSE
TEMPORARY RESTRAINING ORDER
(Penal Code § 186.11)
NOTICE OF PENDENCY OF ACTION
LIS PENDENS
(CCP § 405.20)

FOR COURT USE ONLY

After considering the attached and incorporated affidavit of SENIOR INVESTIGATOR [NAME OF INVESTIGATOR] filed by the Los Angeles County District Attorney pursuant to Penal Code § 186.11, the Court finds that this is a proper case for issuance of a Temporary Restraining Order and Order to Show Cause.

IT IS THEREFORE ORDERED THAT:

1. ☐ The following person shall appear before this Court regarding the issuance of this order to show cause why a preliminary injunction should not be issued: [DEFENDANT'S NAME]

2. No person shall engage, directly or indirectly, in any of the following acts or practices:

☐ Transferring any interest by sale, pledge, or grant of security interest, or otherwise disposing of, or encumbering the following property:

REAL PROPERTY

The residence known as [Address], parcel number [Number] [Legal Description – LOT NUMBER:

[Number]; TRACT: [Number]; [Any other identifying information]].

Owner of Record - [Name of title holder(s)]

BANK ASSETS

☐ Transferring any interest by sale, pledge, or grant of security interest, or otherwise disposing of, or encumbering the personal property listed below or the real property listed in this NOTICE OF PENDENCY:

☐ Transfer, withdrawal, or disbursement, whether by a signatory to the account or any other person, any interest in the following accounts and *any other accounts to which dominion or control is exercised by [Defendant's name in various forms], Social Security Number [Number]:*

[NAME OF BANK] accounts: [Number of first account], [Number of second account].

☐ In addition to the accounts listed in this paragraph, you must disclose any other accounts to which dominion or control is exercised by *[Defendant's name in various forms], or Social Security Number [Number]* to Bureau of Investigations Senior Investigator [Investigator's name], Los Angeles County District Attorney's Office, [Street address], Los Angeles, CA 90012.

1. ☐ It is further ordered that this Order to Show Cause / Temporary Restraining Order / Notice of Pendency shall be personally served on the above named criminal defendant within two court days of the date of the issuance of this order and upon all parties known to the District Attorney to have an interest in the property specified above by registered mail deposited in the United States Mail within five court days of the issuance of this order.

2. ☐ It is further ordered that a notice regarding the property and assets frozen by the Temporary Restraining Order shall be published for at least three successive weeks in a newspaper of general circulation in each county where property affected by the Temporary Restraining order is located. The notice shall set forth the time within which a claim of interest in the protected property is required to be filed.

3. ☐ Any person claiming an interest in the protected property may, at any time within 30 days from the date of the first publication of notice of the petition, or within 30 days after receipt of actual notice, file with the Los Angeles County Superior Court a verified claim stating the nature and amount of his or her interest in the property or assets. A verified copy of the claim shall be served by the claimant on the District Attorney.

DATED:_____ _____

Judge of the Superior Court, County of Los Angeles

SERVICE BY MAIL OF PENDENCY ONLY

INSTRUCTIONS FOR SERVICE: ***After the Court has signed the Order, serve each addressee below by certified mail with a copy of this 3 page signed document, then complete and sign below on two additional signed copies and file one with the court where the case is pending and give the other to the Los Angeles County Recorder for filing.***

1. I am over the age of 18 and not a party to this case. I am a resident of or employed in the county where the mailing occurred. My business address is: Los Angeles District Attorney's Office, [Street Address], Los Angeles, CA 90012.

2. I served the following documents **ORDER TO SHOW CAUSE / TEMPORARY RESTRAINING ORDER / NOTICE OF PENDENCY, 3 pages** by placing a true copy of each document in the United States mail, in a sealed envelope with postage fully prepaid, CERTIFIED, with return receipt requested, as follows:

   a. Date of deposit:
   b. Place of deposit (city and state): Los Angeles, CA
   c. Addressed as follows:

[Defendant's name]
[Defendant's address]

[Interested party 1]
[Interested party 1's address]

[Interested party 2]
[Interested party 2's address]

3. I personally served the following documents **ORDER TO SHOW CAUSE / TEMPORARY RESTRAINING ORDER / NOTICE OF PENDENCY, 3 pages** to each:

   a. [Defendant's name]
   b. Date: _____
   c. Location:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED _____

(TYPE OR PRINT NAME)

_____

(SIGNATURE)

APPENDIX B

JACKIE LACEY
District Attorney
ANNE INGALLS
Head Deputy District Attorney
[DDA NAME], No. [DDA bar number]
Deputy District Attorney
[Street address]
Los Angeles, California 90012
Telephone [Phone number]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. [Name], Defendant.	Case No.: [Number] **PETITION FOR TEMPORARY RESTRAINING ORDER PURSUANT TO PENAL CODE SECTION 186.11; AFFIDAVIT** **DATE: [Date presented to court]**

TO THE HONORABLE JUDGE OF THE ABOVE ENTITLED COURT:

THE PEOPLE OF THE STATE OF CALIFORNIA respectfully submit the following Petition for Temporary Restraining Order Pursuant to Penal Code section 186.11 and Affidavit in support thereof. Defendant [Name] is charged in felony case number [Number] with [Charges here]. These charges include two or more related felonies, a material element of which is fraud or embezzlement. The pattern of related felony conduct involves the taking of more than one-hundred thousand dollars. The defendant is therefore subject to the "aggravated white collar crime enhancement" under Penal Code section 186.11(a) (1).

The People are seeking a Temporary Restraining Order to preserve the following assets and property in the name of or controlled by [Defendant's name and various forms], or Social Security Number [Soc. security no.]:

//

REAL PROPERTY

1. A residence located at [Address]; parcel number [Number] [Legal Description – LOT NUMBER: [Number]; TRACT: [Number]; CITY/MUNI/TWNSP: [Information here]].

BANK ASSETS

1. [Name of Bank], Account Numbers [Number], [Number].

And disclosure of any accounts, deposit boxes or investment accounts on which [Defendant's name in various forms] is named, or are under his or her control.

This Petition is supported by the attached sworn declaration of Senior Investigator [Investigator's name], Los Angeles County District Attorney Bureau of Investigation, pursuant to Penal Code section 186.11(g)(1).

Dated: _____

JACKIE LACEY
District Attorney

ANNE INGALLS
Head Deputy District Attorney

[DDA NAME]
Deputy District Attorney

By

_____

[DDA NAME]
Deputy District Attorney

Attorneys for Plaintiff, The People of the State of California

APPENDIX C

AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE
AND TEMPORARY RESTAINING ORDER

[Investigator's name] swears under oath that the facts expressed by him [her] in this affidavit and the attached and incorporated Order to Show Cause and Temporary Restraining Order are true and that based thereon he [she] has probable cause to believe that the assets sought pursuant to this temporary restraining order are lawfully seizable pursuant to Penal Code section 186.11 and are located at the locations set forth in the affidavit and temporary restraining order.

WHEREFORE, affiant prays that this temporary restraining order be issued and that it may be served between the hours of 7:00 a.m. and 10:00 p.m.

DATED: _____

_____
[Investigator's name], Senior Investigator

AFFIDAVIT OF INVESTIGATOR

Your affiant, [Investigator's name], is a Senior Investigator and California Peace Office currently assigned to the Public Integrity Division of the Los Angeles County District Attorney's Office. Your affiant is the investigating officer in Case Number [Number], entitled People v. [Defendant]. As the case investigator, I have personal knowledge of the criminal investigation underlying this prosecution.

[Defendant's name] was the [Position] for the [Government entity]. From approximately [Start of fraud/embezzlement criminal conduct] to [End of conduct], [Defendant's name] [From here describe criminal conduct, including the total amount taken due to the conduct.]

The criminal complaint was filed with the Los Angeles County Superior Court. A copy of the criminal complaint is attached as Exhibit 1. According to the complaint, [Defendant's name] has been charged with two or more related felonies, as specified in subdivision (a) of Penal Code section 186.11, and the "aggravated white collar crime enhancement" has been alleged pursuant to that section.

Your affiant has been advised that Penal Code section 186.11 allows the Superior Court to preserve any asset or property that is in the control of the defendant charged in that enhancement until the conclusion of the criminal prosecution. Upon conviction of two felonies as specified in section 186.11(a), these assets may be levied upon by the Superior Court to pay restitution to the victim or victims of the alleged crimes and fines imposed pursuant to section 186.11(c). (See section 186.11(h)(1)).

Based [Any analysis such as an audit outside of the District Attorney's Office], and the investigation conducted by the District Attorney's Office, your affiant has probable cause to believe that defendant [Defendant's name] has committed the acts alleged in the criminal complaint and that the estimated losses are at least $[Total amount of loss]. Penal Code section 186.11(c) makes the defendant liable for fines of double the loss, here $[Total loss multiplied by two]. The Superior Court, therefore, has jurisdiction to preserve up to $[Total loss multiplied by three] (total amount = amount of loss plus fines = triple the loss) in assets under the control of

defendant. (See section 186.11(e)). I believe the assets sought to be frozen have a value less than the maximum permissible monetary relief pursuant to section 186.11(e).

You affiant has reason to believe that defendant [Defendant's name] has the following assets and accounts in his control:

Residence at [Address]

On [Date of acquisition], [Defendant's name and any other, such as spouse] purchased the single family residence at [Address] for $[Purchase price]. [Additional details here, including attempts to transfer the property out of defendant's name. Any details that show dominion and control over the property by the defendant. Also include the fact that defendant is still living at the residence if this is true.]

Account Numbers [Number], [Number]; [Name of Bank]

[Details of defendant's dominion and control over the account(s).]

It is affiant's position that these are accounts of [Defendant's name] or within his control.

Affiant further seeks an order to financial institutions to disclose any and all additional accounts on which [Defendant's name in various forms] is named, or are under his or her control.

As to all of the assets above, your affiant believes that these items are in danger of being dissipated or secreted, within the meaning of Penal Code section 186.11(e)(2), if they are allowed to be released to defendant. Your affiant believes that the defendant will, upon conviction, fail to provide payment of restitution and fines. Furthermore, defendant may use the entire amount of the assets for the payment of attorney's fees, again eliminating any possibility of restitution. Restitution plus fines are authorized by Penal Code section 186.11.

I declare under the penalty of perjury that the aforementioned information is true and correct to the best of my knowledge.

Executed in the County of Los Angeles on _____, 2014.

_____

[Investigator's Name], Senior Investigator

APPENDIX D

NOTICE

Pursuant to Penal Code Section 186.11(e)(3), the Los Angeles County District Attorney hereby gives notice that the following property and assets have been frozen pursuant to a temporary restraining order and injunction issued by the Los Angeles County Superior Court, Los Angeles Judicial District, located at [Street address], Los Angeles, California 90012, pursuant to Penal Code Section 186.11 [People vs. [Defendant's name], Case No. [Number]]:

All persons who may have an interest in the above noted property are notified that they must file a verified claim with the Superior Court stating the nature and the amount of their claimed interest. The verified claim must reference the case number and be filed with the Los Angeles County Superior Court at 210 West Temple Street, Los Angeles, California 90012.

BANK ASSETS: [Name of Bank], Account Number [Number]; [Name of Bank], Account Number [Number]; **REAL PROPERTY:** The real property known as [Address], parcel number [Number] [Legal Description - LOT NUMBER: [Number]; TRACT: [Number]; [Any other identifying information]], and any other account or deposit box under the names [Defendant's name in various forms] (Social Security Number XXX-XX-[Last four digits of Soc. Security Number]) whether held alone or jointly with another entity or individual.

Such verified claims must be filed within 30 days from the date of the first publication of this notice or within 30 days after receipt of actual notice. A verified copy of the claim shall be served by the claimant on the Los Angeles County District Attorney's Office, located at [Street Address], Los Angeles, California 90012, attention Deputy District Attorney [Name of DDA].

Chapter 12

INTERNAL WELFARE FRAUD UNIT

I. Introduction

A. Mission

IWFU investigates referrals of potential internal welfare fraud, allegations of solicitation and/or acceptance of bribes, gratuities or emoluments, and other criminal conduct committed by employees or agents of DPSS which is related to their employment by Los Angeles County DPSS.

Sources of referrals include DPSS Human Resources Administrative Investigations, WeTip, the County Fraud Line, as well as information developed by the Recipient Welfare Fraud Division. In addition, the unit conducts investigations designed to uncover potential employee criminal activity within DPSS offices located in Los Angeles County.

IWFU also investigates and prosecutes allegations of theft, embezzlement and/or misappropriation of county funds by county vendors who provide services to the public through grants administered by DPSS. Sources of referrals include the Auditor-Controller's Office, DPSS, CSS, and/or other government agencies.

IWFU works cooperatively with the Welfare Fraud Division (Recipient Welfare Fraud), sharing information and resources when appropriate.

B. Staffing

The unit consists of a Deputy-In-Charge, a Supervising Investigator, and a team of Senior Investigators.

The IWFU counterpart within DPSS is Administrative Investigations, Human Resources Division. The Administrative Investigations division of DPSS has a staff of eight investigators as well as supervisory and administrative staff.

DPSS investigators are not sworn peace officers and are recruited from within the ranks of DPSS staff. As such, their responsibilities and activities are limited to those matters that relate primarily to the systemic functions of DPSS, including the creation, production and retrieval of documents related to welfare applications and programs.

II. Case Handling

A. Case criteria

The IWFU works collaboratively with other law enforcement and governmental agencies, including the Auditor-Controller's Office, the Department of Labor, and the State Franchise Tax Board, as appropriate.

1) IWFU prosecutes cases involving criminal activity committed by employees or agents of DPSS related to their employment or agency with DPSS.

2) A non-employee defendant may be charged in an IWFU case where the criminal activity charged against the non-employee arises from related criminal conduct for which the employee/agent is charged.

3) Similarly, if the theory of liability is a charged or uncharged conspiracy that is related to employment by DPSS, both the employee and recipient cases will be handled by the IWFU. In such cases, the interests of justice and the economy of judicial resources are best served by joint prosecution.

4) Most frequently, fraudulent activity committed by employees or agents of DPSS is charged as a violation of Penal Code Section 424 (Misappropriation of Public Funds), Government Code Section 6200 (Falsification or Alteration of Public Documents), or Welfare and Institutions Code Section 10980(c) (Welfare Fraud).

B. Case opening

A case will be opened by the IWFU DIC when information regarding allegations of criminal activity by a DPSS employee or agent is received.

An Opening Case Data Sheet shall be completed by the DIC and a PID case number shall be assigned. Charges need not be filed in order for a case to be deemed "open." All referrals, preliminary inquiries and investigations shall be opened and a PID number assigned.

Most IWFU case investigations are opened in response to referrals or information forwarded to the IWFU investigators by DPSS.

In order to determine whether the conduct described appears to be criminal in nature, the DIC shall review the available information. After consulting with the IWFU supervising investigator, the DIC will determine whether further investigation is warranted.

C. Case filing

Prior to criminal charges being filed by IWFU, a Case Filing Memorandum shall be prepared in accordance with section IV.D. of this manual. When a case is filed, notification should be made to DPSS, including the name of the defendant(s), the specific charges and special allegations, and the next court date, if known.

D. Case closing

1) A filed case is closed when the case is resolved, whether by imposition of probation or sentence or dismissal.

2) An investigative case will be closed if, after review by the DIC and supervising investigator of all available information, it appears that further investigation is unlikely to garner proof beyond a reasonable doubt of the criminal conduct suspected or identified.

3) Whenever a case is closed, regardless of whether criminal charges were filed or not, a closing memo to the file, explaining the final resolution and reasoning, shall be prepared and forwarded to the Head Deputy for review.

4) When a case is closed due to the insufficiency of admissible evidence, the Head of Administrative Investigation, Human Resources Division at DPSS shall be notified in a timely manner.

5) When a filed case is resolved, whether by negotiated disposition, verdict, or dismissal, notification shall be made in writing to DPSS regarding the nature of the disposition, the reason for the disposition, and/or the sentence imposed.

6) Under limited circumstances, information and evidence obtained during the course of an IWFU investigation may be shared with DPSS only after the investigation is closed.

   In some cases, the matter identified in the investigation may constitute a violation of DPSS policy and procedure but does not rise to the level of criminal activity.

   If, after review by the DIC and supervising investigator, further investigation is not warranted, then the case will be closed and the matter referred back to DPSS for appropriate action.

Referrals returned to DPSS shall be made in writing by the DIC to the Head of Administrative Investigations, Human Resources Division, at DPSS. A copy shall be forwarded to the Head Deputy of PID.

E. Monthly case status reports

The DIC of IWFU shall prepare a Monthly Case Status Report. The report shall summarize the status of all open cases within IWFU, including cases under investigation, pending filing, in court, or subject to final disposition where probation is granted. The summary shall also identify action to be taken on specific cases, as well as proposals for additional investigation.

III. Relationship With DPSS

As stated within the interagency agreement, and in accord with *People v. Eubanks*, the District Attorney's Office retains its independent discretion to pursue the investigation and prosecution of internal welfare fraud cases as it deems appropriate.

DPSS and IWFU shall meet quarterly to discuss the progress of case development and to address issues that have arisen in the course of current investigations. At the quarterly meeting, DPSS and IWFU shall share information regarding indicators of fraudulent activity so as to ensure that such fraudulent activity is identified and appropriately addressed.

The DIC of IWFU is required to provide a quarterly case report to DPSS which summarizes the status of all pending cases and recaps any dispositions reached. The IWFU supervising investigator may prepare the quarterly report.

Chapter 13

LEGISLATIVE IMMUNITY IN CRIMINAL CASES

I. Introduction

The theory of legislative immunity in criminal cases, in other words that legislators should be immune from criminal prosecution for the acts or decisions made in their official capacities, is based upon the separation of powers doctrine.

The California Constitution article III, section 3, states, "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

The argument put forth for legislative immunity in criminal cases is, if prosecutors are able to criminally prosecute a legislator for making an official decision, the executive branch would be impinging on the powers of the legislative branch.

II. Separation of powers

a) *Sklar v. Franchise Tax Board* (1986) 185 Cal.App.3d 616, dealt with a separation of powers issue in ruling that the judicial branch cannot interfere with legislative functions.

   In that case, taxpayers sued the Franchise Tax Board seeking to compel them to adopt certain rules regarding deductions. In ruling on the appeal from a dismissal of the action by the trial court, the appellate court held, "[B]y virtue of the separation of powers doctrine courts lack the power to order the Legislature to pass a prescribed legislative act. Were it otherwise, courts would be involved in 'an attempt to exercise legislative functions, which ...is expressly forbidden....'"

b) A similar case which limited the ability of the courts to inquire into the motive behind legislative action is *County of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721.

   In that matter, a taxpayer sued the Los Angeles County Board of Supervisors challenging a salary ordinance setting wages of county employees. As part of discovery, the taxpayer deposed each supervisor and inquired into discussions among the supervisors which related to the reasons for passing the ordinance. The

supervisors refused to answer the questions. In ruling that the trial court erred in compelling the supervisors to respond, the court held that the separation of powers doctrine precluded the judicial branch from inquiring into the motives of local legislators in passing ordinances.

""[The] rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments."

c) *Boags v. Municipal Court* ((1987) 197 CA3d 65A) discusses the separation of powers doctrine as it relates to the prosecution of a member of the judicial branch for exercising, or failing to exercise, his judicial duties.

The defendant in that case was a municipal court judge who was prosecuted by the district attorney for violating California Penal Code section 182, conspiracy to obstruct justice and California Government Code section 1222, willful failure to carry out a mandated duty. Specifically, it was alleged that the judge failed to disqualify himself as to 145 parking citations issued to his son while driving the judge's car. Disqualification is mandated in such cases by Code of Civil Procedure section 170.1.

In issuing a writ of mandate compelling the trial court to sustain the defendant's demurrer to the G.C. 1222 count, the court ruled, "As applied to judicial officers in the performance of their judicial functions however, we have concluded Section 1222 violates the California constitutional separation of powers...The doctrine of separation of powers demands that the branches of government be coequal. The judicial power therefore must be independent, and that power is compromised when an individual judge wishes to perform his functions but must first consider the possibility the prosecutor may disapprove and charge him criminally..."

III. Legislative immunity from civil actions

a) As a result of the separation of powers doctrine, legislators, both at the state and local level, have absolute immunity from civil suits based on legislative acts. *(Cinevision Corp. v. City of Burbank* (1984) 745 F.2d 560.) That immunity includes actions seeking

declaratory and injunctive relief, as well as monetary damages. (*Traweek v. City and County of San Francisco* (1984) 659 F. Supp. 1012.)

1) In determining what constitutes a "legislative act," the test is whether the acts alleged "resulted from the nature, and in the execution of the official's legislative duties." (*Tenny v. Brandlove* 341 U.S. 367 (1951)).

2) "Although a local legislator may vote on an issue, that alone does not necessarily determine that he or she was acting in a legislative capacity. Rather, '[w]hether actions...are...an exercise of legislative power depends not on their form but upon whether they contain matter which is properly to be regarded as legislative in its character and effect.'" (*Steiner v. Superior Court* (1996) 50 Cal.App.4th 1771).

b) The legislative immunity doctrine, as applied to civil actions, is construed broadly. It encompasses immunity for activities involving planning or enacting legislation and includes conduct in addition to statements made or votes cast during legislative sessions.

1) In the *Traweek* case, the "legislative act" involved meeting with lobbyists, who had a financial interest in certain proposed legislation. The court determined that meeting to be a "traditional legislative" function entitling the legislators to immunity. Although the *Traweek* case was a civil lawsuit, one of the allegations was that the legislators conspired with the lobbyists. The court ruled, "Contrary to the plaintiff's suggestion, the privilege is unaffected by allegations of conspiracy."

2) According to the holding in *Steiner*, civil legislative immunity also extends to protect municipal administrators and executives for actions "taken in direct assistance of legislative activity," but it does not apply to actions which are purely administrative as opposed to legislative.

3) As stated in *Cinevision*, it depends upon whether the actions can properly be regarded as legislative in character and effect. Courts must examine the pleadings and determine whether the acts alleged resulted from the nature, and in the execution of the official's legislative duties.

4) In *Steiner*, the court ruled that budgetary functions are generally legislative and that the act of delegating legislative

authority, as in delegating budgetary authority to the treasurer, is also legislative in nature.

IV. Legislative immunity for criminal acts

Prior to the 2008 decision in *D'Amato v. Superior Court* (167 CA4th 861), there are no California cases that establish, or even suggest, legislative immunity for criminal acts. "Illegal acts such as bribery are obviously not in aid of legislative activity and legislators can claim no immunity for illegal acts." (*Bruce v. Riddle* (1980) 631 F.2d 272).

a) The *Steiner* case only involved an accusation brought pursuant to G.C. 3060 to remove two members of the Orange County Board of Supervisors for violating their duties by failing to adequately supervise the county treasurer who had made speculative investments resulting in severe financial losses to the county. It was never alleged that the supervisors engaged in any criminal conduct.

   The court in *Steiner* found that a G.C. 3060 action "violates the separation of powers provision of the California Constitution insofar as it is used to accuse county supervisors for acts or omissions committed as a part of their legislative functions and which violate no penal statute." However, the court reluctantly conceded there were no California cases extending legislative immunity to criminal conduct. Whether legislative acts which did violate a penal statute would be subject to immunity was not addressed.

b) The crime alleged in *D'Amato* was a violation of G.C. 1090. The prosecutor in that case attempted to extend liability, on an aiding and abetting theory, to those legislators who voted to appoint an employee to a position which would create a 1090 conflict for the employee.

   The act of making the appointment was a legislative act which, according the court, should not subject the officers to prosecution. Allowing the district attorney to prosecute the officers for legislative action "would put the district attorney in the position of a super-governor in the county," causing supervisors to "look over their shoulders before taking any discretionary action for fear the district attorney would find they had not passed muster."

c) The *D'Amato* decision clearly holds that there is legislative immunity for some criminal acts. In responding to the prosecutor's contention that there was no criminal legislative immunity in California, the *D'Amato* court stated, "The district attorney

acknowledges the principles of legislative immunity as articulated in *Steiner*, but contends immunity applies only to civil suits, and does not extend to criminal prosecutions. We disagree."

The court held, "Thus, *Steiner* and *Boags* stand for the proposition that the separation of powers doctrine prohibits prosecutors from using a generally applicable criminal statute to oversee legislators or judges in the performance of their legislative or judicial duties, and thereby impinge on their ability to function independently. This is not to say that the Legislature is prohibited from criminalizing specific legislative acts of a municipal legislative body."

The appellate court in *D'Amato* may have felt that the prosecutor was overreaching in prosecuting those who voted for a contract in which they clearly had no financial interest.

d) In a case in which a public officer engages in legislative activity that clearly violates a specific criminal statute, such as a city council voting to appropriate public funds for the purpose of awarding themselves bonuses, we must assume that a criminal prosecution would not be barred based upon a claim of legislative immunity.

In such a case, the argument could be made that an act by a public officer that violates a specific criminal statute falls outside the definition of a legislative act because it is not a valid exercise of a legislative function.

Chapter 14

REMOVAL OF A PUBLIC OFFICIAL FROM OFFICE

I. Conviction of a Crime

Article VII §8 of the California Constitution disqualifies anyone from holding office who has been convicted of bribery to procure personal election or appointment to office.

Additionally, subsection (b) states: "Laws shall be made to exclude persons convicted of bribery, perjury, forgery, malfeasance in office, or other high crimes from office or serving on juries."

The case of *Rubenstein v. Younger*, 71 Cal.App.3d 406, seems to indicate, at page 418, that "public office" refers to both elected and appointed offices.

A. Crimes resulting in disqualification from office

As this section is not self-executing, legislation was passed to give it effect. One of those statutes is **Government Code §1021**, which states: "A person is disqualified from holding any office upon conviction of designated crimes as specified in the Constitution and laws of the State." As a result of G.C. §1021, a conviction for bribery, perjury or forgery disqualifies a person from elected office.

Government Code §1770 further expands the number of crimes for which a person can be disqualified to include "malfeasance in office" and "other high crimes" as referred to in the constitution. According to subsection (h) of that statute, an office becomes vacant prior to the expiration of the term upon conviction of a felony or "any offense involving a violation of his or her official duties." (See section III.B. at the end of this chapter for a complete statement of the statute.)

B. Disqualification effective upon entry of judgment

Pursuant to section 1770(h), the conviction occurs when "trial court judgment is entered." **Government Code §1770.2** requires the official to be suspended from office, or prevented from assuming office, immediately upon a plea or a verdict. The office would then become vacant upon the entry of judgment.

During the suspension period the official is not entitled to perform any of the duties of the office nor is he or she entitled to be compensated. However, in the event the trial court sets aside or otherwise nullifies the

plea or verdict before the trial court judgment is entered, the inability to assume office or the suspension from holding office shall be lifted, and the person suspended from office shall be restored to full rights of the office, (includes accruals in compensation but excludes interest).

C. Disqualification cannot be stayed or set aside

According to **Government Code §1770.1**, the disqualification from office cannot be stayed pending appeal nor can it be set aside following a successful appeal of the conviction. This issue was addressed and the statute upheld in the case of *Lubin v. Wilson* (1991) 232 CA3d 1422.

However, if the trial court sets aside the verdict prior to judgment being entered, the suspension is lifted and the official is restored to his or her office.

D. Disqualification for "neglect or violation of official duty"

Additionally, **Penal Code §661** gives the judge the discretion to remove a public officer from office for "every neglect or violation of official duty." This section should be considered in cases involving a misdemeanor conviction constituting misconduct in office.

II. Malfeasance In Office

Pursuant to **G.C. 3060**, a public officer can be removed from office for willful misconduct in office or corrupt misconduct in office, including malfeasance, misfeasance and nonfeasance. The procedure is initiated by the grand jury returning an accusation, and is prosecuted by the district attorney in criminal court. For additional information on accusations please refer to that section of the manual.

Also included in that section is a copy of the case of *Steiner v. Superior Court* (1996) 50 CA4th 1771, which presents an excellent overview of the cases dealing with the level of misconduct required to sustain an accusation.

A. Quo warranto

Quo warranto is a civil remedy brought against an official who is unlawfully in public office. For our purposes in the Public Integrity Division, this remedy will normally be sought against an elected official who is not a resident of the district he serves or against one holding incompatible offices.

1) The proceedings are civil in nature and must be brought by, or with the consent of, the California Attorney General. At all times during the proceedings, the Attorney General retains

control and has the authority to dismiss the matter over the objection of the party bringing the action.

2) The relator, the party seeking to bring the action, must make a request to the Attorney General to do so. The Attorney General will determine whether a substantial issue of fact or law exists that should be judicially determined, and whether there is some public interest to be served by litigating the issue.

For additional information on *quo warranto* proceedings please refer to that section of the manual.

III. Governing Law

A. Criminal statutes resulting in removal upon conviction

Penal Code §424 is punishable by imprisonment in state prison and disqualification from "holding any office in this state."

Penal Code §514 punishes the embezzlement of public funds (pursuant to §504) by imprisonment in state prison and ineligibility from any "office of honor, trust, or profit in this state."

Government Code §1097 sets the penalties for a criminal violation of G.C. §1090. Anyone who willfully violates G.C. §1090 is "forever disqualified from holding any office in this state."

Elections Code §18501 permanently disqualifies from public office any public official who knowingly violates any of the voter fraud provisions in Elections Code sections 18500 through 18578.

Penal Code §74 prohibits a public officer from appointing another to public office in exchange for a gratuity or reward. Although a misdemeanor, a violation of this section requires a forfeiture of office and a lifetime disqualification from holding any office in this state.

Penal Code §67 disqualifies from public office anyone who gives or offers a bribe to an executive officer with intent to influence a decision.

Penal Code §165 removes from office, and disqualifies from holding any public office, any local public official who solicits or receives a bribe to influence an official decision.

B. Additional statutes

Cal. Gov. Code § 1770

§ 1770. Events causing vacancy in office

An office becomes vacant on the happening of any of the following events before the expiration of the term:

(a) The death of the incumbent.

(b) An adjudication pursuant to a quo warranto proceeding declaring that the incumbent is physically or mentally incapacitated due to disease, illness, or accident and that there is reasonable cause to believe that the incumbent will not be able to perform the duties of his or her office for the remainder of his or her term. This subdivision shall not apply to offices created by the California Constitution nor to federal or state legislators.

(c) His or her resignation.

(d) His or her removal from office.

(e) His or her ceasing to be an inhabitant of the state, or if the office be local and one for which local residence is required by law, of the district, county, or city for which the officer was chosen or appointed, or within which the duties of his or her office are required to be discharged.

(f) His or her absence from the state without the permission required by law beyond the period allowed by law.

(g) His or her ceasing to discharge the duties of his or her office for the period of three consecutive months, except when prevented by sickness, or when absent from the state with the permission required by law.

(h) His or her conviction of a felony or of any offense involving a violation of his or her official duties. An officer shall be deemed to have been convicted under this subdivision when trial court judgment is entered. For the purposes of this subdivision, "trial court judgment" means a judgment by the trial court either sentencing the officer or otherwise upholding and implementing the plea, verdict, or finding.

(i) His or her refusal or neglect to file his or her required oath or bond within the time prescribed.

(j) The decision of a competent tribunal declaring void his or her election or appointment.

(k) The making of an order vacating his or her office or declaring the office vacant when the officer fails to furnish an additional or supplemental bond.

(l) His or her commitment to a hospital or sanitarium by a court of competent jurisdiction as a drug addict, dipsomaniac, inebriate, or stimulant addict; but in that event the office shall not be deemed vacant until the order of commitment has become final.

California Constitution, Article XII, § 7
§ 7. Transportation passes or discounts; Conflicts of interest

A transportation company may not grant free passes or discounts to anyone holding an office in this state; and the acceptance of a pass or discount by a public officer, other than a Public Utilities Commissioner, shall work a forfeiture of that office. A Public Utilities Commissioner may not hold an official relation to nor have a financial interest in a person or corporation subject to regulation by the commission.

Government Code §91002 prevents any person convicted of a misdemeanor violation of any section of the Political Reform Act from being a candidate for any elective office for a period of four years. It does not remove, nor disqualify from office, an incumbent elected official.

Chapter 15

ACCUSATIONS

I. Overview

California Government Code §3060 provides the authority and procedure for the grand jury to commence the process for removing a public officer for misconduct in office. The statutory grounds, as stated in section 3060, are "willful or corrupt misconduct in office."

Once the grand jury issues the accusation, the district attorney prosecutes the action in criminal court. Although the accusation process is not a criminal prosecution, it follows the same procedures in court and has the same burden of proof. Upon a "conviction" of the accusation the officer is ordered removed from office.

Proceeding by way of accusation as opposed to criminal prosecution presents some advantages and some disadvantages. Among the advantages, the public officer can be removed from office for conduct that may constitute a misdemeanor, or for conduct that does not violate a criminal statute (subject to *Steiner* below). Additionally, there is a six year statute of limitations for initiating an accusation. Therefore, in cases in which the officer committed a crime but the statute of limitations has elapsed, an accusation may still be a viable alternative.

One of the disadvantages of proceeding by way of accusation is the limited remedy of removal from office. There is no other punishment, such as a fine or jail time, authorized. Additionally, there is no probationary period. Once removed from office by way of accusation, there is no prohibition to the official running again for, or being reappointed to, the same office. The situation could arise where a city councilman, for example, is removed from office for misconduct and then is immediately reappointed by his colleagues to fill the newly vacant seat.

II. Public Officer

A. The accusation process applies to local, not state officers

Section 3060 applies to "any officer of a district, county, or city, including any member of the governing board or personnel commission of a school district or any humane officer." As such, any elected local official would qualify including county supervisors, city council members, school board members and water district board members. The accusation process only applies to local, not state officers. As a result, superior court judges, as

state employees are not subject to removal by accusation. 74 Ops.Cal.Atty.Gen. 111.

B. One who is elected or appointed, not employed

Main v. Claremont Unified School District (1958) 161 Cal.App.2d 189 provides some guidance as what constitutes a "public officer" for purposes of section 3060. In defining a public officer the court stated, "One of the necessary characteristics of a public officer is that he perform a public function for the public benefit and that in so doing he be invested with the exercise of some of the sovereign powers of the state...[P]ublic officers hold their jobs by means of election, taking an oath, giving an official bond and their tenure is fixed by law...[P]ublic officers are elected or appointed rather than employed."

C. Two key elements

Although not a case involving an accusation, *People v. Rosales* (2005) 129 Cal.App.4th 81, also dealt with defining a public officer. The *Rosales* court held, "Two elements now seem to be almost universally regarded as essential' to a determination of whether one is a 'public officer': 'First, a tenure of office 'which is not transient, occasional or incidental...and, second, the delegation to the officer of some portion of the sovereign functions of government, either legislative, executive, or judicial'."

III. Conduct That Can Result In An Accusation

As stated in Government Code section 3060, the conduct for which a public officer can be removed is described as "willful misconduct in office or corrupt misconduct in office."

The case of *Coffey v. Superior Court* (1905) 147 Cal. 525, provides the earliest definition of what could constitute willful or corrupt misconduct in office. The defendant, who was the Sacramento chief of police was accused of allowing illegal gambling to take place in several locations around the city. On a writ, following the denial of his objection (demurrer) to the accusation, the California Supreme Court held: "...'misconduct in office' is broad enough to include any willful malfeasance, misfeasance, or nonfeasance in office."

The *Coffey* court held that no criminal intent was necessary to sustain the removal of a public officer by accusation. "Misconduct in office does not necessarily imply corruption or criminal intention. The official doing of a wrongful act, or official neglect to do an act which ought to have been done, will constitute the offense, although there was no corrupt or malicious motive."

A. Malfeasance

1. Malfeasance involves the commission of an unlawful act

In the case of *People v. Harby* (1942) 51 Cal.App.2d 759, Los Angeles City Councilman Harby took a city car on a family vacation in violation of a city ordinance that prohibited the use of city cars for non-city related purposes. The grand jury returned an accusation for willful misconduct in office alleging that the defendant committed embezzlement in violation of Penal Code section 504 and violated the misdemeanor city ordinance. The defendant was convicted by a jury and removed from office. On appeal the court held that conduct that constituted a crime was sufficient to establish willful misconduct in office.

2. Malfeasance does not require any specific intent

In the case of *People v. Becker* (1952) 112 Cal.App.2d 324, the defendant was an insurance broker who sold insurance to a bus company that contracted with a school district to transport children to school. Unfortunately, Becker was also an elected board member on the board of education for the same school district. Based upon the conflict, the grand jury returned an accusation and the defendant was convicted at trial and removed from office.

At trial, his defense was that he had obtained legal advice from a deputy county counsel who told defendant his actions were not illegal. On appeal, the court conceded that the defendant was a man of integrity but held that "the phrase 'willful or corrupt misconduct in office' does not necessarily imply corruption or criminal intention. It means simply a purpose or willingness to commit the act."

B. Misfeasance is unlawful/improper performance of a lawful act

An example of misfeasance can be found in *People v. Tice* (1956) 144 Cal.App.2d 750. In that case, the defendant, who was the marshal of Kern County, wrote several checks on the office account at a time when there were insufficient funds in the account. He was convicted by a jury of willful misconduct in office but the trial judge granted a new trial. In upholding the decision of the trial court, the appellate court ruled that it was reasonable that defendant's actions were "more a mistake of judgment than a purposeful disregard of the care and diligence which would have avoided the overdrafts."

C. Nonfeasance is failure to do what is officially required

1. Intent or knowledge not required

The defendant in *People v. Mullin* (1961) 197 Cal.App.2d 479, was the elected sheriff of Tuolumne County when a juvenile complained to him that her father was molesting her. Since the victim was reluctant to testify, Mullin took no action to investigate the allegation and destroyed the crime report and his notes from the interview with the victim. The grand jury returned an accusation alleging willful misconduct in office for the defendant's willful refusal to investigate the complaint and for his intentionally destroying police reports. He was convicted and on appeal argued that the jury should have been instructed that they must find that the defendant acted with the intent to commit misconduct.

The appellate court held, "It is not necessary that the accused committed the acts or omissions charged with an intent to commit misconduct. Nor is it necessary that the accused knew that the acts or omissions charged constituted misconduct in office."

2. Neglect is not willful misconduct

In *Steiner v. Superior Court* (1996) 50 Cal.App.4th 1771, the appellate court reached a different conclusion. In that case, the grand jury returned accusations against two members of the Orange County Board of Supervisors. The accusation alleged that the two had violated their duties by failing to adequately supervise the county treasurer who had made speculative investments resulting in severe financial losses to the county. In ordering the trial court to sustain the defendants' objection to the accusation, the appellate court held that "something more than neglect is necessary to constitute willful conduct."

The court further held that the accusation process "must be reserved for serious misconduct...that involves criminal behavior or, at least, a *purposeful* failure to carry out *mandatory* duties of office." The *Steiner* ruling is contrary to that in *Mullin*, in that it would require the prosecution to prove that the officer knew of his mandated duties and intentionally failed to carry them out.

IV. Procedure

A. The accusation

An accusation is brought by the grand jury and requires the concurrence of 12 grand jurors. Although there is no statutory or case authority as to the burden of proof required for the grand jury to return an accusation, it

must be presumed that the burden is the same as required for an indictment: a strong suspicion.

a) Additionally, the best practice would be for the district attorney to present any exculpatory evidence even though there is no statute or case law on the issue. Whether the target of the accusation should be notified and given the opportunity to testify or present exculpatory evidence may depend on tactical considerations.

b) The format for the accusation, as described in case law, resembles a complaint alleging a conspiracy, with the specific acts of misconduct listed as overt acts. In fact, some of the cases refer to the specific acts as overt acts. Examples are provided at the end of this chapter. Some of the specific acts listed as misconduct may be violations of criminal or civil statutes but, within the holding of *Steiner*, are not required to be.

B. Service

Government Code section 3062 requires the grand jury foreperson to deliver the accusation to the county district attorney (unless the district attorney is the subject of the accusation). The district attorney then serves a copy of the accusation on the defendant and provides him with written notice to appear in superior court to answer the accusation. GC §3063. The defendant's appearance to answer shall not be less than 10 days from service of the notice to appear. GC §3063. After the defendant is served, the district attorney shall file the original accusation with the clerk of the superior court. GC §3063.

C. Failure to appear

If, after being served, the defendant fails to appear on the date set for the answer, the court may, pursuant to Government Code section 3064, proceed in his absence. There is no law on the issue of whether or not the court can issue a warrant for the defendant's arrest.

D. Objection to legal sufficiency

During his appearance to answer the accusation, the defendant may object to the sufficiency of any article in the accusation or deny the truth of the accusation. GC §3065. Any objection to the legal sufficiency of the accusation must be made in writing (GC §3066) and can be made in the form of a demurrer (i.e., that the conduct alleged does not constitute willful misconduct in office) or in the form of a PC 995 motion (i.e., that the evidence presented is insufficient to sustain the accusation). *People v. Hale* (1965) 232 Cal.App.2d 112.

E. Ruling on legal sufficiency objection

Absent an abuse of discretion, there is no appeal available by the prosecution if the court grants the defendant's objection to the accusation. If the court denies the defendant's objection to the sufficiency of the accusation, the defendant must deny the truth of the accusation or plead guilty. GC §3068.

F. Other objections

A denial of the truth of the accusation may be oral, and is not required to be made under oath, but it must be made on the record. GC §3067. A plea of guilty or a refusal to answer the accusation will result in a judgment of conviction. GC §3069. A denial of the truth of the accusation will result in the judge setting the matter for trial. GC §3069.

G. Trial and judgment

Pursuant to Government Code section 3070, the trial of the accusation is conducted "in all respects in the same manner as the trial of an indictment." The defendant is entitled to a trial by jury and, in order for the defendant to be convicted, the jury must find the accusation to be true beyond a reasonable doubt. If the defendant appeals his conviction, the judgment is stayed and the defendant remains in office pending final resolution of the matter, unlike a conviction for a felony in which the defendant is immediately removed from office pending appeal.

V. Statute of Limitations

An accusation is only appropriate for removal of a public officer for misconduct committed while *in office*. Government Code section 3074 states that an officer may be removed for misconduct in office occurring any time within six years preceding the presentation of the accusation to the grand jury. In accordance with the holding in *People v. Cherry* (1989) 209 Cal.App.3d 1131, an officer can be removed from his/her current office for misconduct occurring during a prior term of office as long as the matter is brought within the six year statute of limitations contained in 3074.

VI. Discretion of the District Attorney to Proceed

Since an accusation can be brought by the grand jury on its own, there is the possibility that a grand jury could return an accusation for political reasons wherein the conduct does not satisfy the *Steiner* criteria. Although there is no authority on the issue, it would seem that the district attorney would have the same legal and ethical duty to dismiss an accusation that does not meet the legal requirements as he would to dismiss an indictment.

VII. Legislative immunity/separation of powers doctrine

The issue of legislative immunity and the separation of powers doctrine arose in the *Steiner* case. The defense contended that the separation of powers doctrine and legislative immunity precluded the executive branch from questioning the legislative decisions of the board of supervisors. They argued that any budget decisions, including those involving the county treasurer, involved legislative action. The appellate court agreed. "We stress our holding is narrow. We find section 3060 violates the separation of powers provision of the California Constitution insofar as it is used to accuse county supervisors for acts or omissions committed as a part of their legislative functions and which violate no penal statute. Because that is what happened here, the objections should have been sustained."

VIII. Preemption

If the charter of a city/county provides for a process of removing a city/county officer from office, the charter provision supersedes GC 3060. *Curphy v. Superior Court* (1959) 169 Cal.App.2d 261.

In *People v. Hawes* (1982) 129 Cal.App.3d 930. The grand jury returned an accusation seeking to remove the district attorney for being intoxicated during working hours. Defendant was convicted following a jury trial. On appeal, the court held that the more specific statute, GC 3001, a misdemeanor statute prohibiting state, county or city officers from being intoxicated while discharging their official duties, the penalty for which is removal from office, controlled over the general statute (GC 3060).

IX. Sample language

A. People v. Mullin

"That said Mervin M. Mullin did on or about the 21st day of June,1959, willfully refuse to investigate a complaint made to him by Donna Huff, now Donna Huff Bailey, accusing her father, Dan L. Huff, of the commission of the crime of a violation of Section 285 of the Penal Code of the State of California, alleged to have occurred in the County of Tuolumne, State of California, within one year prior thereto; and did willfully conceal the commission of the alleged offense from the juvenile authorities, from the District Attorney of Tuolumne County, from the Grand Jury of Tuolumne County, and from any Judicial District Court of Tuolumne County having jurisdiction to issue a Warrant of Arrest on such charge; and did willfully fail and refuse to furnish protection to the said Donna Huff Bailey, who was then a minor female of the age of 15 and did willfully force and compel her to return to the home of her parents with no criminal or protective action or proceeding being taken to protect said

minor from the further commission of such felonious acts upon her by her father.

"That during all said times, herein abovementioned, the said Mervin M. Mullin was the duly elected, qualified and acting Sheriff-Coroner of the County of Tuolumne, State of California."

B. People v. Harby

The Grand Jury of the County of Los Angeles, State of California, hereby accuses HAROLD HARBY, as a member of the Common Council and City Council of the City of Los Angeles, County of Los Angeles, State of California, of WILLFUL AND CORRUPT MISCONDUCT AND MISDEMEANOR IN OFFICE, committed as follows, to wit:

That said HAROLD HARBY was, on the first day of April, 1941, elected a member of the Common Council and City Council of the City of Los Angeles for a term of two years, commencing on July 1st, 1941;

That on said July 1, 1941, the said HAROLD HARBY duly qualified as such City Councilman and he, the said HAROLD HARBY, is now, and at all times since July 1, 1941, has been a duly elected, qualified and acting member of the Common Council and City Council of the said City of Los Angeles, and as such an officer of said City;

That prior to July 3, 1941, and at all times herein mentioned subsequent thereto, the said HAROLD HARBY as such City Councilman had in his possession and under his control as such City Councilman, a certain automobile and motor vehicle owned by said City of Los Angeles for the use of him, the said HAROLD HARBY, as such City Councilman, in and upon the official business of said City;

That between the third day of July, 1941, and the 18th day of July, 1941, the said HAROLD HARBY, as such Councilman, did willfully, unlawfully, fraudulently and corruptly appropriate said automobile to a use and purpose not in the due and lawful execution of his trust, in violation of Section 504 of the Penal Code and in violation of subdivision (1) of Section 63.106 of the Municipal Code of said City of Los Angeles, in that the said HAROLD HARBY did use, operate and drive, and did cause to be used, operated and driven, said automobile and motor vehicle owned by the said City of Los Angeles, as aforesaid, from the said City of Los Angeles to the City of Great Falls, Montana, and return therefrom to said City of Los Angeles, for a purpose other than for or upon the official business of the said City of Los Angeles, to wit, for the private purpose and upon the private affairs of him the said HAROLD HARBY.

Said subdivision (1) of said Section 63.106 reads as follows, to wit: "(a) It shall be unlawful for any person to use or operate any unit of automotive equipment, or any automobile, truck, or other motor vehicle owned by the City of Los Angeles, for any purpose other than for official business of the City of Los Angeles." And which subdivision and section was in full force and effect at all times herein mentioned.

Chapter 16

QUO WARRANTO

I. History and Background

Quo warranto (Latin for "by what authority") is a legal action brought to resolve disputes concerning the right to hold public office or exercise a franchise. California law provides that the action may be brought either by the Attorney General or by others acting with the consent of the Attorney General.

In almost all instances, *quo* warranto is the only method to challenge a claim to public office. *Quo warranto* actions have proven to be an effective means of preserving the integrity of public office while minimizing the threat of unlimited litigation for those holding office. Courts have held that it is a "plain, speedy and adequate" remedy for this purpose.

A. Early History

Quo warranto originated as a writ filed by early English monarchs to challenge claims of royal subjects to an office or franchise supposedly granted by the crown. Wide use was made of *quo warranto* by King Edward I after the year 1274 to challenge local barons and lords who held lands or title on questionable authority.

The independence of the barons had grown after they compelled the king to sign the Magna Carta, and the king's use of the writ helped to reassert regal power – and enhance royal wealth – at the expense of the barons, since many feudal charters could not be documented. (Baker, *An Introduction to English Legal History*, 1979, pp. 125-126.)

Perhaps it was in an effort to assuage noble fears over royal use of *quo warranto* that King Edward "Longshanks" reinstated the practice of *prima nocta* in Scottish fiefdoms.(See, e.g., *Braveheart* (1995).) The king and the nobles compromised title disputes in the Statute of *Quo Warranto* of 1290. Their ongoing struggle both strengthened central government in a time when nation-states were being formed and promoted the growth of due process and individual freedom.

Formal authority to initiate a *quo warranto* action was transferred to the Attorney General by King Henry VIII in a 16th Century court reform measure intended to streamline the action. (Baker, supra.)

In 1683, King Charles II relied on the Crown's *quo warranto* powers to dramatically curtail the growing independence of the City of London. The

following year, in an equally dramatic use of a related proceeding known as *scire facias*, the king revoked the charter of the province of Massachusetts because it had founded Harvard College without royal authority.

After this period, private and irregular jurisdictions in England were generally abolished by acts of Parliament, and *quo warranto* emerged in its modern form in 1710 in the reign of Queen Anne. (Ibid.; see also *International Association of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 695-96, quoting High, Extraordinary Legal Remedies (3rd ed. 1896) pp. 544-556.)

B. Modern Use of *Quo Warranto*

In California, the 1872 code formally abolished the equitable writs of *scire facias* and *quo warranto*, substituting a statutory action by which the Attorney General, acting in the name of the people of the state, could bring an action against any person who unlawfully usurped, intruded into, held, or exercised any public office or franchise. (*People v. Dashaway Association* (1890) 84 Cal. 114, 118; see generally Note (1963) 15 Hastings L.J. 222.)

References to *quo warranto* writs in the state constitution which were added after 1872 caused some confusion, but the constitution was amended in 1966 to delete any reference to the writ. The procedure is established solely as an action at law authorized by statute. Those procedures are contained in sections 802-811 of the Code of Civil Procedure and in sections 1 through 11 of Title 11 of the California Code of Regulations.

Although "*quo warranto*," the customary name for the action, is no longer found in the statute itself – the statutory title is "Actions for the Usurpation of an Office or Franchise" – for reasons of history and convenience it continues to be widely employed in court decision, treaties, and at least one collateral statute. (See generally 8 Witkin, California Procedure (3d ed. 1985) Extraordinary Writs § 6, p. 645; Gov. Code § 1770, sub. (b).)

What began as a legal device of monarchs to centralize their authority has thus evolved into a statutory proceeding to determine whether holders of public office or franchises are legally entitled to those powers.

II. Nature of the Remedy

With one exception, the action authorized by section 803 of the Code of Civil Procedure which we call *quo warranto*, may be brought only by the Attorney

General, in the name of the people of the state, or by a private party acting with the consent of the Attorney General. It may be brought against:

A. Any person who usurps, intrudes into, or unlawfully holds or exercises any public office or franchise; or

B. Any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise within California. Code Civ. Proc., § 803.)

A. No independent right to sue

The remedy of *quo warranto* is vested in the people, and not in any private individual or group, because disputes over title to public office are viewed as a public question of governmental legitimacy and not merely a private quarrel among rival claimants. It is the Attorney General who must control the suit.

a) No matter how significant an interest an individual or entity may have, there is no independent right to sue. (*Oakland Municipal Improvement League v. City of Oakland* (1972) 23 Cal.App.3d 165, 170.)

b) This requirement is jurisdictional. The court may not hear the action unless it is brought or authorized by the Attorney General. (*Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 633, certiorari denied 396 U.S. 821.)

B. Exception

The sole exception to the Attorney General's exclusive control of *quo warranto* actions is found in section 811 of the Code of Civil Procedure.

a) The section authorizes the legislative bodies of local governmental entities to maintain an action against those holding franchises within their jurisdiction, and Attorney General consent is not required.

b) The section requires that the franchise be of a type authorized by the local jurisdiction. (*San Ysidro Irrigation District v. Superior Court (San Diego)* (1961) 56 Cal.2d 708, 716.)

This section was added by the Legislature in 1937 because local government was viewed as able to respond more effectively to this type of local problem. (See Note, (1963) 15 Hastings L.J.199, 224; (1937) 11 So.Cal.L.R. 1, 50-51.)

C. When private party can sue

Although the Attorney General occasionally brings a *quo warranto* action on the initiative of that office, or at the direction of the Governor, usually the action is filed and prosecuted by a private party who has obtained the consent of the Attorney General, for "leave to sue in *quo warranto*."

The private party who obtains leave to sue is termed the "relator." The action is brought in the name of the People of the State of California "on the relation of" the private party who has been granted permission to bring the action.

a) The addition of a relator does not convert a *quo warranto* into a private action. The matter is always brought and prosecuted on behalf of the public. (*People v. City of Huntington Beach* (1954) 128 Cal.App.2d 452, 455.)

b) Even though permission has been granted to a private party to sue, the action does not lose its public character. The Attorney General remains in control of the action and may, for instance, dismiss it over the objection of the private party bringing it or refuse to permit appeal of an adverse ruling. (*People v. Petroleum Rectifying Co.* (1937) 21 Cal.App.2d 289, 291-292.)

D. Purpose

Quo warranto is intended to prevent a continuing exercise of an authority unlawfully asserted, and is not appropriate for moot or abstract questions.

a) Where the alleged usurpation has terminated, *quo warranto* will be denied. (*People v. City of Whittier* (1933) 133 Cal.App. 316, 324; 25 Ops.Cal.Att.Gen. 223 (1955).)

b) By the same token, because *quo warranto* serves to end a continuous usurpation, no statute of limitations applies to the action. (*People v. Bailey* (1916) 30 Cal.App. 581, 584-585.)

E. Judgment

The remedies available in a *quo warranto* judgment do not include correction or reversal of acts taken under the ostensible authority of an office or franchise.

Judgment is limited to ouster or forfeiture (and possible a fine or damages), and may not be imposed retroactively upon the prior exercise of official or corporate duties. (*Ensher, Alexander & Barsoom, Inc. v. Ensher* (1965) 238 Cal.App.2d 250, 255.)

F. Exclusive remedy

Normally, *quo warranto* is the exclusive remedy in cases in which it is available. (*Cooper v. Leslie Salt Co., supra,* 70 Cal.2d at pp. 632-633.) Title to an office may not be tried by mandamus, by injunction, by writ of certiorari, or by petition for declaratory relief. (*Stout v. Democratic County Central Com.* (1952) 40 Cal.2d 91 (mandamus); *International Assn. of Fire Fighters v. City of Oakland, supra*, 174 Cal.Ap.3d at pp. 693-694 (injunction); *Hull v. Superior Court* (1883) 63 Cal. 174, 177 (writ of certiorari); *Cooper v. Leslie Salt Co., supra*, 70 Cal.2d at 634 (declaratory relief).)

G. Other remedies

The existence of other remedies does not prevent the state from bringing a *quo warranto* proceeding. (*Citizens Utilities Co., v. Superior Court* (1976) 56 Cal.App.3d 399, 405; 18 Ops.Cal.Atty.Gen 7 (1951).) For example, the fact that criminal proceedings may be brought against a corporation does not prevent the state from initiating ouster proceedings through *quo warranto*. (*Id.* at 406; 22 Ops.Cal.Atty.Gen. 122 (1953).)

Quo warranto tries title to public office; it may not be used to remove an incumbent for misconduct in office. (*Wheeler v. Donnell* (1896) 110 Cal. 655.)

H. Annexation proceedings

In the past, *quo warranto* proceedings were frequently utilized to challenge the validity of completed annexation proceedings.

Mandamus, pursuant to Code of Civil Procedure section 1085, was used to challenge incomplete annexations. (See generally *Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 271; *Hills for Everyone v. Local Agency Formation Commission* (1980) 105 Cal.App.3d 461, 470.)

Today, a statutory procedure exists to challenge such completed annexations, and *quo warranto*, although still available, is rarely utilized.

I. Typical application

At present, the most common application of the *quo warranto* procedure is adjudicating the rights of individuals to hold public office. A "public" office is one in which "the incumbent exercises some of the sovereign powers of government." (*Stout v. Democratic County Central Com., supra* 40 Cal.2d at 94.) Not all offices are "public" offices. In *Stout* the court held that a

party committeeman exercises the powers of a political party, not the sovereign power of the public.

J. When mandamus proceeding is appropriate

While *quo warranto* is regarded as the exclusive remedy to try title to public office, under certain circumstances a court will consider title to an office in a mandamus proceeding under section 1085 of the Code of Civil Procedure when title is "incidental" to the primary issue to be resolved by the action.

a) Generally, this occurs when a de facto officer brings an action such as mandamus to recover some incident of office, such as salary, and a determination as to whether the petitioner is entitled to recover the incident of office must necessarily be preceded by a ruling as to whether the petitioner is entitled to the office (See *Klose v. Superior Court* (1950) 96 Cal.App.2d 913 and cases cited therein.)

b) The court must decide whether title may be decided in the action "incidentally" to the ostensible primary issue. (*Stout v. Democratic County Central Comm., supra,* 40 Cal.2d at 94; see also *Lungren v. Deukmejian* (1988) 45 Cal.3d 727.)

In *Lungren*, the California Supreme Court held that mandamus is not available to a claimant to public office unless the claimant has a present interest in the office, a present right to assume it and is owed a duty to respondents that can be the subject of mandamus.

Under the facts alleged, the court held that the claimant had no present right to the office because he was not eligible to assume the office at the time the petition was filed. As the respondents owed him no present duty, he was not entitled to the writ. The court reached the merits of Mr. Lungren's claim nonetheless, reasoning that the issue was a matter of public importance requiring speedy resolution.

The underlying issue involved interpretation of constitutional language specifying what legislative action was required to confirm or reject the Governor's appointment of Mr. Lungren as State Treasurer. (See *Jolicoeur v. Mihaly* (1971) 5 Cal.3d 565, 570, fn. 1.) The court concluded that Mr. Lungren's nomination has been rejected by the Legislature. It did not discuss *quo warranto* at all.

III. Application to the Attorney General

A. For Leave to Sue in *Quo Warranto*

Application to the Attorney General for leave to sue in quo warranto may be made by a private person or local agency pursuant to the rules and regulations issued by the Attorney General. (C.C.R., tit. 11 §§ 1-11, Appendix B.) It is unusual for the Attorney General's Office to initiate such suits; most are brought by private parties after consent has been granted.

1. Service

a) The procedure must begin with service by the proposed relator (or that person's attorney) on the proposed defendant, and subsequently on the Attorney General, of an application for leave to sue in *quo warranto*. This application must include the following:

1) A verified proposed complaint prepared for the signature of the Attorney General, a deputy attorney general, and the attorney for the relator, as attorneys for the plaintiff, and one copy of the proposed complaint.

2) A verified statement of facts necessary to rule on the application.

3) Points and authorities in support of the application.

4) Copy of the notice to the proposed defendant of the filing of the application giving the proposed defendant 15 days to appear and show cause why leave to sue should not be granted. (Twenty days are permitted if the notice is served outside the county in which the action is brought.)

5) Proof of service of all of the above documents upon the proposed defendant.

This paperwork should be sent to the Office of the Attorney General in Sacramento (1515 K Street, Sacramento, 95814), attention: Assistant Attorney General Opinions Unit.

b) Upon receipt of this letter and the accompanying documents, the Attorney General's Office sends a letter of acknowledgement to the proposed relator with a copy to the proposed defendant.

c) The proposed defendant is allowed 15 or 20 days, depending upon where service is made, to file a written response with the Attorney General opposing the application.

This response should include the proposed defendant's verified statement of the facts, points and authorities in support of the opposition, and proof of service of these documents upon the proposed relator. The proposed relator is allowed 10 days to reply.

d) These times may be shortened or extended as provided in sections 3 and 4 of the regulations. In addition, the deputy attorney general assigned to review the application papers may, in his or her discretion, request any further information, points and authorities, or discussion deemed necessary for the office's consideration of the application.

2. Granting of leave to sue

a) If leave to sue is granted, the relator will be asked to post a $500 surety bond. (See C.C.R., tit. 11 § 28.) Copies of the bond form are available from the Attorney General's Office.

b) A proposed relator may request that the complaint be filed in court immediately. Under section 10 of the Code of Regulations this may be done in unusual cases upon a sufficient showing of urgent necessity.

   1) In most cases where this is allowed, the urgent necessity presented is the imminent running of time under a statute of limitations on a collateral issue (there is no statute of limitations on *quo warranto* itself) which could make later filing legally or practically impossible.

   2) Immediate filing may also be allowed in cases where there is a need to preserve the status quo, pending a decision on the application by the Attorney General.

c) In all cases where such a request is granted, the practice of the Attorney General's Office is to require that the proposed relator file a document, entitled "Provisional Leave to Sue," in court with the complaint.

   The complaint and the Provisional Leave to Sue must be signed by the Attorney General or a deputy. The relator may take no further action in court (except to have the summons issued) until the Attorney General's Office has ruled on the application for leave to sue.

d) In examining applications for leave to sue in *quo warranto*, the Attorney General's Office requires that all facts to be alleged in the complaint be set forth in detail.

1) While broad, generalized allegations may be legally sufficient for many types of pleadings in California, the Attorney General's Office believes that *quo warranto* litigation is expedited by immediately placing all of the facts before the defendant and the court, and therefore requires great specificity in factual allegations.

2) Moreover, such alleged facts must be based upon direct evidence, not on information and belief. (27 Ops.Cal.Atty.Gen. 249, 253 (1956).)

3) The California Supreme Court has upheld the Attorney General's refusal to permit *quo warranto* actions unless the supporting affidavits contain factual allegations so specific that perjury charges may be brought if any material allegation is false. (*Lamb v. Webb* (1907) 151 Cal. 451, 455-456.)

4) This same certainty has also been required in the complaints. In addition, the Attorney General's Office frequently requires documents, maps, etc., to be submitted for examination.

IV. Consideration and Determination

A. Criteria Utilized by the Attorney General

After the proposed relator and the proposed defendant have submitted all materials, the application is taken under consideration by the Attorney General's Office.

1. In the public interest

In deciding whether to grant leave to sue, the primary issue considered by the office is whether a public purpose will be served.

a) As stated in 39 Ops.Cal.Atty.Gen. 85, 89 (1962): "In deciding whether to grant or deny leave to sue, the Attorney General must not only consider the factual and legal problems involved, but also the overall public interest of the people of this state . . . "

b) Or, as stated in 35 Ops.Cal.Atty.Gen, *supra,* at 124: "This office has the duty to conduct a preliminary investigation of proposed *quo warranto* litigation to determine whether a substantial issue of fact or law exists which should be judicially determined (11 Ops.Cal.Atty. Gen. 182, 183; 27 Ops.Cal.Atty.Gen. 33, 35), and leave should be granted only if there is some public interest to be served. (*People v. Bailey,* 30 Cal.App.581, 584.)"

c) (See also 67 Ops.Cal.Atty.Gen. 151 (1984); 40 Ops.Cal.Atty.Gen. 78, 81 (1962); 37 Ops.Cal.Atty.Gen. 172, 175 (1961).) The "public purpose" requirement has been interpreted as requiring "a substantial question of law or fact which calls for judicial decision." (67 Ops.Cal.Atty.Gen. 151, 153 (1984); 25 Ops.Cal.Atty.Gen. 237, 240 (1955).)

2. Prima facie showing

The Attorney General's office will not, however, examine the likelihood of either party prevailing in court.

a) As stated at 12 Ops.Cal.Atty.Gen. 340, 341 (1949):

> "[I]n acting upon an application for leave to sue in the name of the people of the State, it is not the province of the attorney General to pass upon the issues in controversy, but rather to determine whether there exists a state of facts or question of law that should be determined by a court in an action in *quo warranto*; that the action of the Attorney General is a preliminary investigation, and the granting of the leave is not an indication that the position taken by the relator is correct, but rather that the question should be judicially determined and that *quo warranto* is the only proper remedy."

b) It should be noted, however, that the office will require that the party seeking leave to sue make a showing of a substantial likelihood of success. Although no final judgment will be made by the office on the merits, a strong prima facie showing must be made before the office will permit the disruptive effect on governmental operations which accompanies most *quo warranto* actions.

3. Three Fundamental questions

Courts have required that ambiguities concerning potential disqualifications from office should be resolved in favor of continued eligibility. (*Helena Rubenstein Internat. v. Younger* (1977) 71 Cal.App.3d 406, 418.)

Thus, in determining whether it is in the public interest to permit a *quo warranto* action to go forward, the Attorney General's Office addresses three fundamental questions:

1) Is *quo warranto* the proper remedy to resolve the issues which are presented?

2) Has the proposed relator raised a substantial question of law or fact?

3) Would the public interest be served by judicial resolution of the question?

All three questions must be resolved in the affirmative in order for this office to grant leave to sue.

B. Grant/denial of Leave to Sue is at Attorney General Discretion

The statutes grant the Attorney General's Office broad discretion in its determination of proposed *quo warranto* actions.

Code of Civil Procedure section 803 provides that the Attorney General "may" bring the action on his or her own information or on complaint of a private party, and it "must" be brought when the Attorney General "has reason to believe" that the appropriate conditions exist or when directed to do so by the Governor.

The use of the word "must" in the latter portion of the provision does not create a mandatory duty due to the qualifying language that the Attorney General must have "reason to believe" that the appropriate conditions exists. (8 Witkin, Cal. Procedure (3d ed. 1985) Extraordinary Writs, § 7 at p. 646; *International Association of Fire Fighters v. City of Oakland, supra*, 174 Cal.App.3d at 697.)

Hence, the Attorney General "has discretion to refuse to sue where the issue is debatable." (*Id.* at 697.)

1. Abuse of discretion in denying leave to sue

a) Although a writ of mandamus may be issued to compel the issuance of leave to sue where the Attorney General has abused his or her discretion, such a writ is available only where it may be shown that the refusal to issue leave to sue was "extreme and clearly indefensible." (*Lamb v. Webb, supra,* 151 Cal. at 454; *City of Campbell v. Mosk* (1961) 197 Cal.App.2d 640, 645.)

There is no instance in California law where a court has compelled the Attorney General to grant leave to sue in *quo warranto*.

b) In *City of Campbell* the proposed relator contended that the Attorney General had abused his discretion in denying leave to sue since a substantial issue of law had been presented. The court firmly rejected this proposition, reaffirming the importance of the Attorney General's discretionary review:

"To hold that the mere presentation of an issue forecloses any exercise of discretion would mean, in effect, that, contrary to the holding in the *Lamb* case, the Attorney General could exercise no discretion. The crystallization of an issue thus does not preclude an exercise of his discretion; it causes it . . .

"The exercise of the discretion of the Attorney General in the grant of such approval to sue calls for care and delicacy. Certainly the private party's right to it cannot be absolute; the public interest prevails. The presence of an issue here does not abort the application of such discretion; the issue generates the discretion. Only in the event of an extreme abuse of the discretion should the courts annul the Attorney General's decision." (197 Cal.App.2d at 650-651.)

2. Court review of discretion in denying leave to sue

In *International Association of Fire Fighters v. City of Oakland, supra*, 174 Cal.App.3d 687, the court in dicta suggests that where a proposed relator has an individual right distinct in kind from the right of the general public enforceable by an action in the nature of *quo warranto*, a court should review the discretion of the Attorney General according to an "arbitrary, capricious, or unreasonable" standard rather than the "extreme and clearly indefensible" standard enunciated in the *Lamb v. Webb* and *City of Campbell* cases. (174 Cal.App.3d at 697-98.)

The Attorney General was not a party in the *International Association* case. The court in the *International Association* case set forth no California authority to support his proposition, but it indicated that it would be "in accord with decision of sister states which have considered the matter," quoting extensively from 74 Corpus Juris Secundum, *Quo Warranto*, § 18. (*Id.* at 697-98.)

There has been no further judicial discussion of this matter following the *International Association* decision. It is the opinion of the Attorney General's Office that the dicta set forth in the *International Association* case concerning the standard by which courts review the discretion of the Attorney General is not a correct statement of the law in California. The Supreme Court's ruling on the matter, first issued in 1907 in the *Lamb* case, continues to be the controlling doctrine in this state.

The *International Association* court based its reasoning upon the theory that where a private interest is involved, the privilege to be

heard should not be lodged in a public official. The court found this theory consistent with the rule in other states.

It must be remembered, however, that California law differs from other states in that regardless of whether a private interest is at stake, the cause of action is always carried forward in the name of and on behalf of the public. (*People v. Milk Producers Assn.* (1923) 60 Cal.App. 439, 442; *People v. San Quentin Prison Officials* (1963) 217 Cal.App.2d 182, 183.) While a different standard may be appropriate in some states depending upon whether the cause of action concerns private interests as well as the public, there is no basis for such a distinction in California law.

C. The Decision of the Attorney General

The decision to either grant or deny leave to sue is released following its approval by the Attorney General. Until 1963 all such decisions were published in the opinions of the Attorney General of California. Currently, these opinions are either published or issued as letters, depending on their precedential value.

a) Copies will be sent to each party. If leave to sue has previously been granted, the Attorney General's office will also issue a document entitled "Leave to Sue" which the proposed relator must file with the complaint, unless a provisional leave to sue has previously been granted under section 10 of the regulations. The relator then causes the summons to be served and proceeds with the lawsuit.

b) As noted above, before any complaint may be filed, the proposed relator must file with the Attorney General's Office a $500 undertaking payable to the State of California. (*People v. Sutter St. Ry. Co.* (1897) 117 Cal.604, 612; Code Civ. Proc., § 810; C.C.R., tit. 11, §§ 6, 28.) This undertaking is to protect the state from all costs, damages, or expenses which might be recovered against the plaintiff in the action. The Attorney General's Office requires the undertaking to be by a corporate surety with the bond cosigned by the relator as principal.

V. Prosecution of the *Quo Warranto* Action

The action remains under the control of the Attorney General's Office. The Attorney General's name and assigned deputies will appear on all briefs filed by the relator, and the Attorney General retains the discretion to approve all court filings in advance and to require that the complaint (and subsequent pleadings) be modified or dismissed, or to refuse to permit an appeal. Copies of all documents filed must be provided to the Attorney General. *(People v.*

City of Huntington Beach, supra, 128 Cal.App.2d at 455; C.C.R., tit. 11 §§ 7, 8, 9, 11.)

A. Burden of Proof

Quo warranto proceedings are considered civil actions and are governed by the applicable provisions of the Code of Civil Procedure. (*People v. City of Richmond* (1956) 141 Cal.App.2d 107, 117.) With respect to the burden of proof, however, the common law rule reverses the plaintiff's customary burden and requires the defendant to establish the lawfulness of holding the office or franchise. *(People v. City of San Jose* (1950) 100 Cal.App.2d 57, 59; *People v. Hayden* (1935) 9 Cal.App.2d 312, 313.)

Although this rule has never been formally changed, it has been suggested that under the statutory proceedings the state must prove that rights claimed under a disputed franchise have actually been exercised. Where the exercise of those rights is not at issue and only the right to exercise them is challenged, however, the common law rule applies and the defendant has the burden of establishing his or her right to the franchise. (See 53 Cal.Jur.3d (1978), *Quo Warranto,* § 29.)

B. Judgment

Judgment against a defendant for usurping, intruding into, or unlawfully holding an office or franchise serves to oust the defendant from the office or franchise. (Code Civ. Proc., § 809.) The defendant must pay costs, and the court in its discretion may impose a fine of up to $5,000, which must be paid into the State Treasury. (*Id.)* Damages may be awarded to a successful relator who claims entitlement to the office unlawfully held by the defendant. (Code Civ. Proc., § 807.) The court may also order that such a relator be restored to the office. (Code Civ. Proc., § 805; *People v. Banvard* (1865) 27 Cal. 470, 475.)

APPENDIX A

Code Of Civil Procedure

Section 803

An action may be brought by the attorney-general, in the name of the people of this state, upon his own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state. And the attorney-general must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the governor.

Section 804

Whenever such action is brought, the Attorney General, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightly entitled to the office, with a statement of his right thereto.

Section 805

In every such action judgment may be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice may require.

Section 806

If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he will be entitled, after taking the oath of office and executing such official bond as may be required by law, to take upon himself the execution of the office.

Section 807

If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover, by action, the damages which he may have sustained by reason of the usurpation of the office by the defendant.

Section 808

When several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise.

Section 809

When a defendant, against whom such action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding any office, franchise, or privilege, judgment must be rendered that such defendant be excluded from the office, franchise, or privilege, and that he pay the costs of the action. The Court may also, in its discretion, impose upon the defendant a fine not exceeding five thousand dollars, which find, when collected, must be paid into the Treasury of the State.

Section 810

When the action is brought upon the information or application of a private party, the Attorney General may require such party to enter into an undertaking, with sureties to be approved by the Attorney General, conditioned that such party or the sureties will pay any judgment for costs or damages recovered against the plaintiff, and all the costs and expenses incurred in the prosecution of the action.

Section 811

The action provided for in this chapter may be maintained by the board of supervisors or any county or city and county or the legislative body of any municipal corporation, respectively, in the name of such county, city and county or municipal corporation against any person who usurps, intrudes into or unlawfully holds or exercises any franchise, or portion thereof, within the respective territorial limits of such county, city and county or municipal corporation and which is of a kind that is within the jurisdiction of such board or body to grant or withhold.

APPENDIX B

California Code Of Regulations
Title 11
Regulations Governing Quo Warranto Proceedings

Section 1

Any person desiring "leave to sue" in the name of the people of the State of California under any law requiring the prior permission therefor of the Attorney General (which person is herein referred to as the relator), shall serve his application (which shall include the papers referred to in Section 2) upon the proposed defendant and within five days after such service shall file the same with the Attorney General.

Section 2

The relator shall submit to the Attorney General his application for "leave to sue," which application shall consist of the following: (a) Original verified complaint, together with one copy thereof, and a verified statement of facts. The proposed complaint shall be prepared for the signature of the Attorney General, a deputy attorney general and the attorney for the relator, as attorneys for plaintiff. (b) Points and authorities showing why the proposed proceeding should be brought in the name of the people, and supporting the contention of relator that a public office or franchise is usurped, intruded into or unlawfully held or exercised by the proposed defendant. (c) A notice directed to the proposed defendant to the effect that relator is about to apply to the Attorney General for "leave to sue" in the proceeding therein named, and that the proposed defendant may, within the period provided in Section 3 hereof, show cause, if any he have, why "leave to sue" should not be granted in accordance with the application therefor. (d) Proof of service of such application, complaint, statement of facts, points and authorities and notice upon the proposed defendant.

Section 3

The proposed defendant shall be allowed 15 days after service, within which to appear and show cause in accordance with the provisions of Section 2(c), if the notice be served within the county in which the proceeding is to be brought, and 20 days if served elsewhere. A shorter time may and will be prescribed by the Attorney General in special cases or upon a showing of good cause therefor. An extension of the period for appearance herein limited may be granted by stipulation between the relator and the proposed defendant if filed with the Attorney General, and may be granted by the Attorney General upon a showing of good cause therefor. Any statement of facts filed by the

proposed defendant shall be verified in like manner as the proposed complaint.

Section 4

The relator shall then be allowed 10 days (or such further time as may be granted by stipulation filed with the Attorney General, or upon a showing of good cause therefor), in which to reply to the showing thus made by the proposed defendant.

Section 5

Proof or admission of service must accompany all papers submitted to the Attorney General under Sections 2, 3 and 4.

Section 6

If the application for "leave to sue " be granted, the relator must, within 10 days after receiving notice of such action (unless further time be granted), present to the Attorney General an undertaking executed to the State of California in the sum of $500, to the effect that the relator will pay any judgment for costs or damages that may be recovered against the plaintiff, and all costs and expenses incurred in the prosecution of the proceeding in which such "leave to sue" is granted. The sureties upon the undertaking shall be approved by the Attorney General.

Upon receipt and approval of said undertaking, the Attorney General will transmit to the relator, in writing, "leave to sue" in the name of the people, which "leave to sue" shall be filed with the clerk of the court simultaneously with the filing of the complaint.

Section 7

The complaint filed in the proceeding shall be the proposed complaint herein before referred to, changed or amended as the Attorney General shall suggest or direct, and the relator shall not thereafter in any way change, amend or alter the said complaint without the approval of the Attorney General.

Section 8

The Attorney General may at all times, at any and every stage of the said proceeding, withdraw, discontinue or dismiss the same, as to him may seem fit and proper, or may, at his option, assume the management of said proceeding at any stage thereof.

Section 9

The relator must immediately inform the Attorney General of the date of the filing of the complaint, and the court number thereof, and shall thereafter notify the Attorney General, without delay, of every proceeding had, motion made, paper filed, or thing done in the proceeding, or in relation thereto, and must send to the Attorney General promptly a copy of every paper or document filed by any of the parties to the proceeding including the judgment, and when service of any paper in said proceeding is made on the relator by the opposing party the relator shall secure an additional copy of such paper, which additional copy shall be at once forwarded to the Attorney General.

Section 10

In special cases and upon a sufficient showing of urgent necessity, "leave to sue" will issue forthwith upon the filing of showing and undertaking required by Sections 2 and 6, upon condition that the defendant may thereafter show cause and that the right of the relator to maintain and prosecute such proceeding shall be thereafter determined.

Section 11

In the event that the judgment of the trial court shall be adverse to the relator, no appeal therefrom shall be taken without first securing the approval of the Attorney General.